

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,780

ROBERT J. JUDD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

378

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

GEORGE MORRIS FAY,
United States Attorney.

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157

STATEMENT OF QUESTIONS PRESENTED

In the opinion of appellee the questions presented are:

1. Whether appellant has waived his right to challenge the legality of his arrest, and if he has not, whether the legality of his arrest is material to the issues in this case.

2. Whether there is substantial evidence in the record to support the pre-trial judge's finding that appellant consented to the search of his apartment and the seizure of his shoes.

3. Whether the trial judge properly admitted certain secondary demonstrative evidence when the prosecution showed that the primary evidence had been lost prior to the day of trial.

4. Whether there was sufficient evidence to sustain the trial judge's denial of appellant's motion for judgment of acquittal made at the conclusion of the Government's case.

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UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant Robert J. Judd was charged in a two-count indictment returned in the District Court for this jurisdiction with the crimes of housebreaking and grand larceny. D. C. Code (1940) §§ 22-1801 and 22-2201. Appellant entered a plea of not guilty to both counts of the indictment and made timely motion to suppress certain evidence in the Government's possession. That motion was heard and denied, and trial by jury was thereafter had which resulted in a verdict of guilty as charged on both counts. Subsequently, judgment was entered in accordance with the jury's verdict and appellant was sentenced to serve three to nine years in the penitentiary on each of the two counts, the sentences to run concurrently. This is an appeal from that judgment and sentence.

Appellant's principal assignment of error on this appeal questions the action of the trial judge in denying appellant's

motion to suppress evidence. Appellant's theory is that his arrest was unlawful because it was made without probable cause (the arresting officers had no warrant of any kind) and that a search of his apartment, made sometime after his arrest, was also unlawful because it was not incident to his arrest and, even if it was incident to his arrest, because it was incident to an unlawful arrest.

Appellee contends, on the other hand, that appellant has waived his right to challenge the legality of his arrest and that the search of appellant's apartment, which was concededly not incident to his arrest, was made with his express consent—indeed at his request.

Appellant alleged in his motion to suppress that the property sought to be suppressed "was seized against the will of the petitioner without a valid search warrant or warrant of arrest and prior to arrest and formal arrest of your petitioner without a warrant and after an exploratory search, in clear violation of the rights of said petitioner under the provisions of the Fourth (4th) and Fifth (5th) Amendments to the Constitution." (J.A. 76) It was not alleged that petitioner's arrest was itself unlawful.

At the hearing on the motion to suppress counsel for appellant limited his preliminary statement of his contentions to the fact of appellant's arrest and the circumstances surrounding the search of appellant's apartment. (J.A. 84-85) Nothing was said to indicate to the court that appellant challenged the initial validity of his arrest. The prosecutor, in answering the preliminary statement of appellant's counsel also confined himself to the circumstances surrounding the search, making it clear that the Government justified the search itself solely on the ground of appellant's consent thereto. (J.A. 85-86)

At the conclusion of the Government's preliminary statement at the hearing on the motion to suppress, the following occurred (J.A. 86):

THE COURT: Isn't this the issue in the case? Whether the search and seizure were with the defendant's consent? Isn't that the only issue to be determined?

MR. BACON (the prosecutor): Yes.

THE COURT: Because, obviously, this type of search and seizure is illegal, it not being incident to the arrest, unless there is a search warrant or unless the defendant consents.

MR. BACON: The Government agrees to that, your Honor.

THE COURT: Very well. We will try the issue of consent.

Appellant's counsel said nothing, during or after the above colloquy and made no objection to the court's limitations of the issues to be examined on the hearing.

Testimony was thereupon taken which may be briefly summarized as follows:

Metropolitan Police Sergeant William W. Friel stated that he had first seen appellant at police headquarters, shortly after midnight on the morning of March 25, 1950; that he had told appellant that the police were looking for a pair of shoes, and had asked appellant if he had any extra shoes at home. Appellant had said that he had some other shoes, and, in response to a question put by Friel, that he did not mind if the officers went to his apartment to look for them. (J.A. 86-87)

Friel further testified that appellant and he and two other officers then went to appellant's apartment where appellant unlocked the door. The officers proceeded to search the apartment and seized a pair of shoes and a pair of pants.¹ (J.A. 87). At no time, Friel stated, did either appellant or appellant's wife object to the search made by the officers. (J.A. 87-88).

Detective Sergeant Edwin F. Talbott of the Metropolitan Police Department was the next witness called by the Government. Sergeant Talbott testified on direct examination that he had questioned appellant at police headquarters in regard to a housebreaking that had been recently committed and that appellant had denied all knowledge of it. (J.A. 90) Appellant had been asked if he had any burglars'

¹ Some money was also seized but was later returned to appellant. Its seizure is not material here since appellant sought to have only the pants and shoes returned (J.A. 85).

tools at home and he had replied that he had not and that the police could go to his apartment and look for themselves if they desired. (J.A. 90) The officers and appellant had then gone, with appellant's express permission and knowledge, to appellant's apartment where appellant had unlocked the door and all had entered. The police then searched the apartment and seized one pair of shoes and one pair of pants. (J.A. 90-91.)

On cross-examination Sergeant Talbott stated that appellant had told the police officers that they were free to go to his apartment because he had nothing there to hide. (J.A. 92, 93) Talbott also said that at no time did appellant or his wife object to the officer's presence in their apartment or the search of the apartment. (J.A. 91) On cross-examination Talbott again testified that appellant had been questioned about burglars' tools and had denied having any and further, that appellant had been asked to describe the clothes he had worn on the previous night (the night of the housebreaking and grand larceny) and appellant had described them in detail, stating that they were all at his apartment (J.A. 93).

At this point, the Government rested and appellant called his first witness, appellant's wife, who stated merely that she had been at home in the early morning of March 25, 1950, when the police arrived there with her husband and searched the apartment. She did not hear appellant give the police permission to make the search. (J.A. 94.)

Appellant himself then took the witness stand. He stated that he had been arrested in the evening of March 25, 1950, at the house of Ernest White² and had been taken thereafter to police headquarters and questioned in regard to a certain housebreaking. (J.A. 95) Appellant testified that he had denied all knowledge of the housebreaking, that he had no conversation with the police concerning the clothes he had worn the night before, that he gave no one permission to go to his apartment and make a search there and that

² White was appellant's co-defendant below. He was also convicted of housebreaking and grand larceny and his appeal is now docketed in this Court at No. 10,783.

the police had taken him there forcibly, without his knowledge, and against his will. (J.A. 96-98.)

At the conclusion of the hearing on the motion to suppress evidence, the court found as a fact that appellant had given the police officers permission to search his apartment and the motion was denied (J.A. 99-100).

At appellant's trial on the merits testimony tending to prove the following facts was introduced by the Government:

On the night of March 23-24, 1950, certain persons broke into the warehouse of the Standard Transfer & Storage Co., located at Fourth and Bryant Streets, N. E., Washington, D. C., broke open a safe within the warehouse and removed therefrom \$1622 in cash and \$1000 in travelers' checks signed by William B. Doster, President and General Manager of the Standard Transfer & Storage Co. (J.A. 16-18). Entry to the warehouse was apparently obtained by forcing open a window at ground level. (J.A. 18) A large number of cardboard cartons were piled up by this window and, on top of one of these cartons, the investigating police officers found a very clear foot-print impression (J.A. 18, 20, 37-40). The carton top on which this impression appeared was seized by the police and held as evidence (J.A. 29-30, 36-37).

Sometime thereafter the investigating officers received information from a private citizen (J.A. 22, 56) which caused them to proceed to 908 Eighth Street, N.W., where they arrested one Ernest White (J.A. 21). This was at approximately 8:30 p.m. of March 24, 1950. While the officers were in White's room, making a search, appellant Judd entered, identified himself, and was arrested (J.A. 23-24).

Judd was taken to police headquarters where he was questioned for sometime (J.A. 27-28) after which the investigating officers, together with Judd, went to Judd's apartment and took from there a pair of shoes (J.A. 30-31). These shoes together with the footprint impression were turned over to the F.B.I. (J.A. 31). There, a laboratory technician established that the left shoe taken from Judd's apartment was the shoe which had left the footprint at the warehouse of the Standard Transfer & Storage Co. (J.A. 45-51).

Appellant did not take the stand in his own behalf but a number of his relatives did. Their testimony tended to show that Judd had been visiting with his brother in Capitol Heights, Maryland, at the time when the crime charged in the indictment was committed (J.A. 59-63).

The jury, as stated previously, returned a verdict of guilty on both counts of the indictment (J.A. 71). Appellant's motion for new trial was denied (J.A. 71-74) and this appeal followed.

STATUTES INVOLVED

Title 22, Section 1801 of the District of Columbia Code (1940) provides:

Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years. (Mar. 3, 1901, 31 Stat. 1323, ch. 854, § 823.)

Title 22, Section 2201 of the District of Columbia Code (1940) provides:

Whoever shall feloniously take and carry away anything of value of the amount or value of \$50 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one, nor more than ten years. (Mar. 3, 1901, 31 Stat. 1324, ch. 854, § 826; Aug. 12, 1937, 50 Stat. 628, ch. 599.)

SUMMARY OF ARGUMENT

I

Appellant failed to challenge the legality of his arrest during the proceedings in this case in the trial court. Appellant's failure so to do constitutes a waiver of that defense which should prevent appellant from raising such a

question on appeal. However, even if the issue of the legality of appellant's arrest is properly before the Court, it is immaterial to the decision of this case.

II

The pre-trial judge found as a fact that appellant consented to the search of his apartment and seizure of his shoes. There is substantial evidence to support the pre-trial judge's finding. Consequently, that finding should not be overturned on appeal.

III

Certain primary demonstrative evidence in the Government's possession could not be found on the date of trial. The Government's explanation of its absence satisfied the trial judge and he properly admitted secondary evidence in its stead.

IV

The Government's case was sufficiently strong to go to the jury. Appellant's motion for judgment of acquittal was properly denied.

ARGUMENT

I

Appellant Has Waived His Right to Challenge the Legality of His Arrest. However, Even If He Had Not Done So, That Question Would Be Immaterial to the Decision of This Case.

As appears from the statement of facts set forth hereinbefore, appellant at no time made in the District Court any contention that his arrest was initially invalid. Nor was that issue raised by the Government's argument in the lower court, since the Government did not attempt to defend the challenged search and seizure as an incident of a lawful arrest but elected instead to defend the search on the theory of appellant's consent thereto. As a result, the existence or non-existence of probable cause to arrest appellant was not tried below and no testimony appears in the record which could justify a finding for either party to this

appeal. Nevertheless, appellant now urges that this Court should inquire into the question of probable cause to arrest appellant and, in effect, make a finding of fact in appellant's favor.

Appellee offers a dual defense to this argument. Primarily, appellee takes the position that since appellant failed to attack the legality of his arrest in the trial court, thus preventing the Government from tendering its proof of probable cause, appellant should not now be heard to make such an argument in this Court. And secondarily, the Government contends that, since the search and seizure in this case were not incident to appellant's arrest, the search and seizure would not be initiated by an unlawful arrest and that, for that reason, the legality vel non of appellant's arrest is immaterial.

At the time of appellant's arrest, the information in the arresting officers' possession consisted largely of an extra-judicial statement made to the officers by a private citizen, linking appellant to the crime of which he now stands convicted. (J.A. 22) This extra-judicial statement was obviously hearsay evidence and, as such, it was clearly inadmissible at appellant's trial on the merits, so long as appellant did not question the legality of his arrest. However, had appellant challenged the legality of his arrest, the extra-judicial statement of the informant would have become admissible, not to prove the fact of appellant's guilt but as bearing on the issue of the existence of probable cause. Since appellant did not challenge, before or during his trial, the validity of his arrest, the Government was prevented from introducing evidence on that issue. For, of course, the prosecution would not be allowed to introduce hearsay testimony damaging to appellant under the guise of rebutting a defense which was not made. *Bowman v. United States*, 50 App. D.C. 90, 267 F. 459 (1930).

Numerous cases establish the effect of appellant's failure to make timely challenge to the legality of his arrest.

In *Seguro v. United States*, 275 U.S. 106 (1927), the Supreme Court of the United States held that the orderly administration of criminal justice requires that neither an

appellate court nor a trial court shall consider questions as to the legality of a seizure or the probable cause to justify a search where such questions are not timely raised and no excuse appears for the failure to raise them at the proper time.

And in *Bennett v. United States*, 70 App. D.C. 76, 104 F. 2d 209 (1939), this Court, following the rule of the *Seguro* case, declined to consider either the alleged illegality of a search or the lack of probable cause to justify an arrest where neither issue had been properly preserved in the trial court.

To substantially the same effect as the foregoing cases are *Dunbar v. United States*, 156 U.S. 185, 192 (1895), and *Depina v. United States*, 78 U.S. App. D.C. 31, 137 F. 2d 673 (1943).

It is submitted that appellant, having failed to challenge the legality of his arrest in the trial court, cannot now raise that issue on appeal.

However, assuming *arguendo* that the issue of probable cause is properly before this Court and assuming further that the police officers who arrested appellant did not have probable cause to believe that appellant had committed a felony,³ appellee maintains that any illegality in the arrest is immaterial, if, as appellee contends, it did not taint the subsequent search and seizure.

In *Sheehan v. Huff*, 78 U.S. App. D. C. 391, 142 F. 2d 81 (1944), Sheehan, who was serving a sentence for robbery, instituted a habeas corpus proceeding in the District Court for this jurisdiction to test the legality of his detention. He alleged that prior to his trial he was brought from Virginia to the District of Columbia without extradition proceedings in spite of his protest and his unwillingness to waive extradition. On Sheehan's appeal to this Court from an order denying his petition it was said:

Counsel for petitioner, appointed by the Court to represent him on appeal, has filed a persuasive brief.

³ The Government does not concede that the arrest was actually illegal. On the contrary, the Government contends that the officers had ample probable cause to justify their arrest of appellant.

It admits that the Supreme Court has decided that jurisdiction in a criminal case is not impaired by the fact that the accused was brought before the court in an unlawful manner, but urges these decisions should not be followed. We believe, however, that the question is so well settled that it cannot be re-opened here. *Mahon v. Justice*, 1888, 127 U.S. 70, 7 S. Ct. 1204, 32 L. Ed. 283; *Lascelles v. Georgia*, 1893, 148 U.S. 537, 13 S. Ct. 687, 37 L. Ed. 549; *Pettibone v. Nichols*, 1906, 203 U.S. 192, 27 S. Ct. 111, 51 L. Ed. 148, 7 Ann. Cas. 1047.

Obviously, then under the rule of *Sheehan v. Huff*, the legality or illegality of appellant's arrest is immaterial except as it may have affected the subsequent search of appellant's apartment and the seizure of his shoes.

It is believed that the facts of this case make it evident that the search of appellant's apartment was not, in the legal sense, incident to appellant's arrest. *Agnello v. United States*, 269 U.S. 20 (1925). The legality of the search and seizure must turn therefor on whether or not appellant did, in fact, voluntarily consent thereto. The issue of appellant's consent will be dealt with hereafter. Here, the inquiry still is the effect of an allegedly unlawful arrest upon a subsequent but non-incidental search and seizure.

It might, perhaps, be argued that any consent given by appellant while in custody subsequent to his arrest was a product of his arrest and was, for that reason, without legal effect if the arrest was unlawful. Precisely this argument was advanced in *Gibson v. United States*, 80 U.S. App. D.C. 81, 149 F. 2d 381 (1945), cert. den. sub nom. *O'Kelley v. United States*, 326 U. S. 724. In that case one O'Kelley had been taken into custody on a narcotics charge in flagrant violation of his Constitutional rights. However, while at Police Headquarters and still under arrest, O'Kelley voluntarily admitted to the police, in response to a question, that he had a supply of marihuana in a certain house on Providence Street, which he would surrender if the officers would go there with him. As a result, the officers and O'Kelley went to the Providence Street address and a large amount of

marihuana was seized. O'Kelley was convicted in the District Court of two narcotics violations and appealed to this Court which reversed the judgment on one count but affirmed as to the count here under discussion. In so doing the court said (80 U.S. App. D.C. at 84) :

The marihuana obtained by the officers from the Providence Street house was the basis of the second count of the indictment against O'Kelley, and his statements to the officers following his arrest and his other statement the next day were, as he admitted, entirely voluntary, and though when the first statement was made he was under an illegal arrest, we think that fact does not require the rejection of evidence volunteered by him for reasons sufficient to himself and made without force or compulsion or promise of reward. And, if this is correct, obviously, conviction on the second count of the indictment must be sustained.

On the basis of the foregoing, it is submitted that (1) appellant has waived his right to challenge the legality of his arrest and (2) even if the question of the legality of the arrest is properly before the Court it is irrelevant because it did not affect the subsequent search of appellant's apartment or the seizure of his shoes.

II

There Is Substantial Evidence to Support the Pre-trial Judge's Finding That Appellant Consented to the Search of His Apartment and the Seizure of His Shoes.

Appellant contends that the search of his apartment was unlawful because he did not in fact consent to the search.

As set out in the statement of facts at the outset of this brief, the issue of appellant's consent to the search was separately tried before the pre-trial judge at the hearing on appellant's motion to suppress evidence. The police officers testified that appellant consented to the search. Appellant denied that he did so. This presented a controverted issue of fact as to which the pre-trial judge's finding should not be disturbed on appeal if it is supported by substantial evidence. Here, the lower court's finding rests on the

testimony of two police officers. Surely, it cannot be argued that such a finding lacks the support of substantial evidence.

Moreover, reason and common sense are in accord with the pre-trial judge's determination. No identifiable part of the proceeds of the crime charged in the indictment was found in appellant's apartment. Appellant, of course, knew that this would be the case, and this may explain his ready acquiescence to the search proposed by the police officers.

At all costs, the pre-trial judge's conclusion on the consent issue was reached principally on the basis of his judgment as to the comparative credibility of the two police officers and appellant. (J.A. 99-100.) With only a cold record before it, this Court is not in a position to substitute its judgment on such a question for that of the trial judge.

One other of appellant's contentions requires answer. It is suggested, on the authority of *Trupiano v. United States*, 334 U.S. 699 (1947), that even if appellant consented to the search of his apartment, the search was illegal because of the lack of a search warrant and the foreseeability of the need for one. The *Trupiano* case, aside from the fact that it has been over-ruled by *Rabinowitz v. United States*, 339 U.S. 56 (1950), is not in point because it does not involve a search to which consent was given. So far as can be discovered no court has ever held that a search without a warrant is unlawful where the search was made with the voluntary permission of the owner of the premises searched. And this Court expressly held such a search to be lawful in *Gibson v. United States*, *supra*.

III

The Trial Judge Properly Admitted Into Evidence a Photograph of the Carton Cover and Footprint Found at the Scene of the Housebreaking When It Appeared That the Government Was Not Able to Produce the Actual Carton Cover and Footprint.

As appears from the statement of facts, the principal evidence linking appellant to the crime of which he now stands convicted was a footprint left at the scene of the crime on the cover of a cardboard carton which was found

immediately below the window through which the thieves gained their entrance. At appellant's trial the prosecution was unable to produce the carton cover on which the footprint was impressed. The prosecution was able to establish that the carton cover had been seized by the police at the scene of the crime shortly after the crime was discovered (J.A. 20, 29-30), that it was initialed by the police officer who had it in his custody (J.A. 41), and that it was turned over to an F.B.I. expert who photographed the footprint (J.A. 31, 36-37, 45). Over appellant's objection, the Government was allowed to introduce this photograph into evidence (J.A. 47-49). The initials of the police officer who had taken the carton cover into custody were clearly visible in the photograph. (J.A. 49)

Appellant maintains that the introduction of this secondary evidence constituted prejudicial error. However, the contrary has been so often held in similar situations in various federal courts that, in appellee's view, no extended discussion need be undertaken here. The rule of universal application seems to be that secondary demonstrative evidence is admissible where it is shown to the satisfaction of the trial court that it is the best evidence available at the time of trial, either through the loss, destruction or inaccessibility of the primary evidence; and where it is further shown that the absence of the primary evidence was not caused by the voluntary act of the party offering the secondary evidence due to some sinister purpose. *McDonald v. United States*, 89 F. 2d 128 (C.C.A. 8, 1937), cert. den. 301 U.S. 697; *Hartzell v. United States*, 72 F. 2d 659 (C.C.A. 8, 1934); *United States v. Porter*, 96 F. 2d 773 (C.C.A. 6, 1938), cert. den. 305 U.S. 612; *Haas v. United States*, 93 F. 2d 427 (C.C.A. 8, 1937); *O'Shea v. United States*, 93 F. 2d 169 (C.C.A. 6, 1937).

Appellant suggests that the Government intentionally suppressed the carton top and footprint in question. But, the sufficiency of the explanation for the absence of the primary evidence, and the consequent admissibility of the secondary evidence, were matters which rested within the sound discretion of the trial judge. *O'Shea v. United*

States, supra. No showing of an abuse of discretion in this regard is made by appellant on this appeal.

IV

**The Government's Case Was Strong Enough to Go to the Jury.
Appellant's Motion for Judgment of Acquittal Was Properly
Denied.**

The prosecution's case against appellant rested on three principal facts.

First, officer Talbott testified on cross-examination that appellant had been overheard the morning after the commission of the housebreaking and grand larceny charged in the indictment, discussing the division of the proceeds from a housebreaking involving over \$2500. (J.A. 22) Talbott further testified that the housebreaking at the warehouse of the Standard Transfer & Storage Co. was the only crime committed in this area within the previous twenty-four hours involving so large a sum as \$2500. (J.A. 23).

Second, appellant was arrested in company with Ernest N. White, his co-defendant below, who was also convicted on both counts of the indictment in this case. (J.A. 21-22).

Lastly, it was shown that one of the shoes which were seized in appellant's apartment had made the footprint beneath the window through which the thieves had gained entrance to the Standard Transfer & Storage Company's warehouse. (J.A. 45-51)

Appellant urges (Br. 17) that his motion for judgment of acquittal, made at the conclusion of the Government's case, should have been granted because the evidence against him was wholly circumstantial. Only recently this Court rejected a like contention on a similar set of facts in *Patalas v. United States*, No. 10,687, decided November 9, 1950.

The true rule governing the action of a trial judge on a motion for judgment of acquittal is that the motion should be granted if there is "no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *Curley v. United States*, 81 U.S. App. D.C. 389 at 393, 160 F. 2d 229.

In the instant case it can hardly be said that the finding at the scene of the crime of a footprint made by appellant's shoe, unexplained, was not sufficient evidence from which "a reasonable mind might fairly conclude guilt beyond a reasonable doubt." Moreover, appellant's association with his co-defendant White at the time of his arrest is not without significance. *Edwards v. United States*, 78 U.S. App. D.C. 226, 139 F. 2d 365 (1945), cert. den. 321 U.S. 769.

It is submitted that the evidence in this case amply sustains the trial judge's denial of appellant's motion for judgment of acquittal.

CONCLUSION

No prejudicial error was committed during the proceedings in this case in the District Court. The judgment of that court should be affirmed.

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JOINT APPENDIX

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JOINT APPENDIX

1

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Criminal No. 699-50

UNITED STATES OF AMERICA,

v.

ERNEST N. WHITE AND ROBERT J. JUDD, DEFENDANTS

Washington, D. C.,
Thursday June 8, 1950.

The trial of this case was begun before District Judge Jennings Bailey and a jury in Criminal Division No. 2 at 10:00 a. m.

Appearances:

On behalf of the United States: Mr. Harold Bacon, Assistant United States Attorney.

On behalf of the defendant Ernest N. White: Mr. P. W. Harris.

On behalf of the defendant Robert J. Judd: Mr. Joseph D. DiLeo.

* * * * *

6 WILLIAM B. DOSTER was called as a witness and, having been first duly sworn, testified as follows:

* * * * *

7 Your name is William B. Doster?

A. Yes, sir.

Q. You are employed by the Standard Transfer & Storage Company, Incorporated?

A. Yes, sir.

Q. What is your position there, sir?

A. President and manager.

Q. Where is that company located?

A. In a warehouse at what is called Fourth and Bryant Streets, Northeast, about a hundred yards down off of Fourth Street.

Q. Is that in Washington, D. C., sir?

A. Yes, sir.

Q. Was the company in operation there on the 23rd and 24th of March, 1950?

A. Yes, sir.

Q. What time did the business close on the 23rd of March, 1950?

A. Shortly after 7:30 at night.

Q. Were you there when your business closed?

8 A. No, sir. I talked to the boys at the office at 7:30. They were ready to leave.

Q. What time had you left?

A. About quarter of seven.

Q. Did you come back to your office on the 24th of March?

A. Yes, sir; about 6:30 in the morning of the 24th.

Q. What did you find when you got there on the morning of the 24th?

A. When I started to unlock the door, the inside didn't look exactly right. After I got the door opened, the safe was opened and papers all over the floor.

Q. How was the safe opened? Did you discover that? Was it opened by the combination?

A. No; it was just beaten open.

Q. What did you do then?

A. Closed the door and went on up to No. 12 and reported it.

Q. As a result of that report, did you come back?

A. Yes, I came right back.

Q. Who came back with you, sir? Do you know?

A. The officers in scout cars were there when I got back. Sergeants Friel and Lubore also came along pretty shortly.

9 Q. Did you have occasion to make an examination of the contents of the safe when you got back?

A. Yes, sir.

Q. What did you discover as regards the contents of the safe?

A. The cash box and two money drawers—the contents were gone.

Q. What were the contents of those money drawers, sir?

A. Well, there was a good many checks and certain records. One drawer was my personal drawer.

Q. Let us start with your personal drawer. What was in your personal drawer?

A. My bank records, and included were some checks also—a thousand dollars in travelers' checks—twenty \$50 checks.

* * * * *

12 Q. How much cash was in that drawer on the evening of March 23, 1950?

A. \$1,622.10.

Q. How much cash was in that drawer on the morning of March 24, 1950?

A. It was empty.

* * * * *

Cross-examination.

By Mr. DiLEO:

Q. Mr. Doster, when you returned to your place of business on the morning of the 24th, as you have stated—6:30 a. m.—and you observed the condition of this place, did you at that time notice where the place had been entered into, or from where or by what means?

A. At the time that I first opened the door, I merely closed the door and went up to the 12th Precinct. When we came back, then we looked around. We found a window open, and one sash out of the window.

13 Q. On what side of the building was that?

A. Over on the north—northwest corner.

Q. Northwest corner?

A. Yes.

Q. Of the building?

A. Yes.

Q. Could you tell the Court and members of the jury whether the ground there beneath that window was cement or was dirt?

A. Well, outside it was dirt. It had been raining, and inside there was dirt in front of this window. The floor is concrete.

Q. That is, inside the place?

A. Yes.

Q. I am speaking of outside. It is dirt outside, beneath the window; is that correct?

A. Yes.

Q. You say it had been raining?

A. It had rained all night.

Q. Mr. Doster, with respect to these money orders or cashier's checks, or whatever checks they are, you endorsed them, you stated, one time? You signed them once?

A. Yes, I signed them once at the bank, when I bought them.

14 Q. Isn't it a fact that these checks are absolutely worthless unless countersigned?

A. Yes; I have to sign them again.

Q. Yes. In other words, they are worthless as they are now?

A. Yes.

Q. You never saw Mr. Judd before this occasion, did you?

A. I saw him on Saturday morning, the 25th, I think that would be.

Q. You saw him?

A. Yes, sir.

Q. Did you know him prior to that?

A. No.

Q. Did you have any conversation with Mr. Judd?

A. No.

Q. Did you ever see Mr. Judd in your place at the warehouse?

A. No.

Q. In fact, that was the only time you had ever seen him up until today; is that correct?

A. That is right.

Q. Did you have any discussion with Mr. Judd about the entering of your place?

A. No, sir.

Mr. DiLEO: I believe that is all, if the Court please.

* * * * *

15 WILLIAM W. FRIEL, was called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. BACON:

Q. What is your full name and assignment, Officer, please?

A. William W. Friel, Detective Sergeant, Police Headquarters, attached to the Safe Squad.

Q. Speak slowly, so that every one can understand what you say.

Were you so assigned on the 24th of March, 1950?

16 A. That is right, sir.

Q. Did you have occasion to go to the Standard Transfer & Storage Company?

A. I did.

Q. What time did you go there, and on what date?

A. I went there on March 24 about 7 a. m.

Q. What did you find when you got there?

A. I found a safe had been ripped open from the face through the doors.

Q. When you say, "ripped open from the face," what do you mean?

A. The doors ripped open.

Q. Off their hinges?

A. No; through the center of it. It was a double-door, cabinet-type safe, and they ripped it from the center.

Q. What else did you find?

A. I checked the place and found out it had been entered through a west window in the back end of the building by breaking the glass and also ripping out the frame. We found a foot print on a box there—a pasteboard box.

Mr. BACON: If Your Honor please, would the Court grant the Government a ten-minute recess? The property clerk did not bring over all the evidence I have. I have just discovered it is missing.

17 EDWARD M. TALBOT, was called as a witness and, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

* * * * *

Q. In the course of your duties, did you have occasion to arrest one Ernest Newton White on the evening of March 24, 1950?

A. I assisted in that arrest.

Q. Where did that arrest take place?

18 A. 906 Eighth Street, Northwest.

Q. What type of place is that?

A. It is a large rooming house.

Q. Where did the arrest take place in that house?

A. The second floor, front bedroom.

Q. Whose room is that?

A. The room of Ernest White.

* * * * *

20 Cross-examination.

By Mr. HARRIS:

* * * * *

Q. When you went to 908 Eighth Street on the night of the 24th, did you and your fellow officers have a search warrant with you?

A. We did not.

Q. Then, what was it that caused you to go there?

21 A. We received certain information on the morning of the 24th of March concerning White, Judd, and another man. Acting on that information, we went to these premises in the early evening, after we had previously determined the identity of White as Ernest N. White and of Judd as Robert Judd.

After determining their identities, we went to these premises, 908 Eighth Street, Northwest, and secreted ourselves in such position that we could overhear conversations in the second-floor bedroom that was occupied by White.

While Sergeant Sisson and myself were secreted in that position, we heard White and another man enter his room, and a suitcase was dropped to the floor. We were also informed by another occupant of the house that they had come in with a suitcase.

The conversation then went on between White and the other man to the effect that they were going to pack up and leave town for Philadelphia.

Because our purposes originally there were to listen to the conversations in that room, we then felt it was necessary to confer with a higher official of the police department, and Sergeant Sisson left the building and conferred with Lieutenant Cooper. Together they came back and entered White's room. I was still in a position to hear the conversation between White and Lieutenant Cooper and Sergeant Sisson.

22 After a few minutes, when I felt there was sufficient time elapsed that my hiding place would not be known, I left where I was hidden and went into White's room.

White had then been placed under arrest by Sergeant Sisson.

* * * * *

We then started to search the room. That is when the checks were found—during the course of that search.

While we were still there searching, Judd came into the room. He was placed under arrest immediately.

Q. Sergeant Talbot, let us go back to the beginning of your statement. You stated that you went there upon some information. Who was the person who gave you that information?

MR. BACON: If Your Honor please, I will object to that. The Government feels that the officer does not have to disclose the source of his information, in order to protect that individual.

THE COURT: Read the question, please.

(The last question was read by the court reporter.)

THE COURT: I overrule the objection.

23 By THE COURT:

Q. Answer the question.

A. I am trying to think of the name of the party. Right now the name escapes me. I can further identify him by where he lived there. Maybe Mr. White will help us out.

By Mr. HARRIS:

Q. Is he a person by the name of Harvey?

A. Yes.

Q. Where did Mr. Harvey live in relationship to Mr. White's room?

A. The adjacent room.

Q. The adjacent room? What did Mr. Harvey say in regard to Mr. White?

A. He stated to us that he had on various times heard conversations from the occupants of White's room—White, Judd, a man by the name of Don, and someone else—about committing housebreakings and safe jobs.

Q. He actually said it in those words?

A. In those words—about housebreakings and safe jobs.

Q. He named all the people involved.

A. He named them as Whitey, Judd, Don, and another man he didn't give the name of; that on the morning of the 24th he was awakened by an argument in that room, in which White said that twenty-five hundred dollars out of a job belonged to him.

24 Q. He said, "A job"? He didn't say which job? Or did he say in which job? He just said twenty-five hundred dollars belonged to him out of that job?

A. That was the word used.

Q. "Job" was the word used. At the time this information was given to you, did you know of any robbery that had been committed?

A. No. We searched the records of the police department and found out from our teletypes that there was only one felony committed in the course of the past 24 hours that involved any large sum of money, and that was the Standard Transfer Company safe job.

* * * * *

25 Q. All right, sir. Now, after you searched the records and found out from the teletype system that there was a housebreaking, you still did not know that Mr. White or his associates were a part of it, did you?

A. It was the only logical deduction anyone could make. That was the only job committed in the past 24 hours involving a large sum of money, so it was merely a matter of deduction to connect the job with the two people.

Q. What led you to make that deduction?

26 A. I think that is a logical course. Any logical man would deduct from information that he had that that was the only job committed, and a large sum of money that was talked about was involved, so that was the only job that could be done.

Q. You didn't know Mr. White before?

A. I know Mr. White's reputation. I have seen him down at police headquarters.

Q. Then, you actually acted on the basis of his reputation?

THE COURT: I think you are going rather far in your examination now.

Mr. HARRIS: I am sorry.

* * * * *

30 Direct examination (Resumed).

By Mr. BACON:

* * * * *

31 Q. You say a little while later Judd came in the room. Were you present when Judd arrived at White's room?

A. I was.

Q. Did you hear any conversation between Judd and anyone else there?

A. When Judd came in, I immediately placed him under arrest myself. I identified myself as a police officer and told him he was under arrest, as soon as he told me his name.

I asked Judd if he knew anything about the travelers' checks, and he said, "No."

I asked him if he had been there the night before or the morning before, and he said he had not. He said he had just dropped by to see White; he hadn't seen him for quite a long time

Q. "The night before or the morning before?"

A. He said he had not been there on the night of March 23rd or the morning of March 24th.

Q. Had not?

A. Had not. He denied any knowledge of the travelers' checks whatsoever.

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36 Cross-examination.

By Mr. DI LEO:

Q. Sergeant Talbot, when did you go to 908 Eighth Street?

A. About—somewhere between 8:30 and quarter of nine. In that neighborhood.

37 Q. Morning or evening?

A. P. M.

Q. That is, on the night of the 24th?

A. Yes, sir.

Q. When was this shop or place entered into—Standard Transfer Company?

A. Sometime from—if I recall the time, it happened sometime in the night of March 23 and 6 a. m. on the morning of the 24th.

Q. You received this call at 9:30 p. m. on the 24th?

A. We received the information 9:30 a. m.

Q. About 9:30 a. m.?

A. That is right; about 9:30 a. m.

Q. That is, on the morning of the 24th?

A. On the morning of the 24th.

* * * * *

41 Q. You stated that from your position in the house you heard White and someone else talking; is that correct?

A. Yes.

Q. You did not hear Judd's voice there that night?

A. I couldn't identify the second voice as being Judd's, no.

Q. You could not identify him?

A. No, I couldn't.

* * * * *

42 Q. Sergeant Sisson left after this other man left?

A. That is correct.

Q. Did he arrest anybody at that time?

A. Oh, no; it was on his return that he did.

Q. I did not ask you about his return. At that time.

A. No, he arrested no one at that time as he left the house.

Q. He left shortly after or about the time this other man left the room?

A. A few minutes after the other man left the room.

Q. From this adjoining room could you see anybody leave the room?

A. I don't believe so. I didn't attempt to.

Q. I say could you.

A. If I opened the door, I could.

Q. You didn't think it was important at that time to open the door to see who left?

43 A. No, we didn't.

* * * * *

44 Q. Then, you would say you were in the house there from around or approximately 8:30 that evening until sometime after 10; is that right?

A. That is correct.

Q. Would you say that Mr. Judd came into this room after 10 o'clock?

A. I couldn't say; I don't know. I didn't look at any watch. There was no clock there, and the time was going.

Q. When Mr. Judd came into the room, did you immediately place him under arrest?

A. I did, as soon as he identified himself as Robert Judd. I asked him his name.

45 Q. As soon as Judd identified himself?

A. That is right.

* * * * *

Q. Isn't it a fact, Officer Talbot, that you and members of your squad picked up Robert Judd on January 2, 1947

for investigation and released him the following day with no charges?

A. No. I wasn't connected with the General Assignment Squad on January 1, 1947.

Q. Isn't it a fact that you on January 21, 1947—and other members of the robbery squad—picked Judd up for investigation, and he was released the following day?

A. I don't know.

* * * * *

46 By Mr. DI LEO:

Q. Sergeant Talbot, when Judd came into the room—you can't fix the exact time; if I am wrong, correct it—about 10 o'clock—

A. It could have been, sure. It was somewhere around that neighborhood, I think.

Q. Around the neighborhood of 10 o'clock?

A. Yes.

47 Q. You placed him under arrest?

A. I opened the door.

Q. Did you place him under arrest when he entered the premises?

A. Well, I have to tell you exactly what I did; then you can come to the conclusion whether I placed him under arrest or not.

Q. Answer my question.

THE COURT: Overruled. Let him answer in the way he wishes.

By THE COURT:

Q. Answer the question.

A. I opened the door. He said, "Come in."

I showed my badge and said, "Police." I said, "Who are you?"

He says, "Robert Judd."

I said, "Well, you are under arrest."

By Mr. DI LEO:

Q. What did you charge him with, Sergeant?

A. Right at that particular moment?

Q. Yes.

A. There was no place to charge him—no place to file a formal charge in that house.

Q. What informal charge did you place?

A. There was none placed there.

48 Q. Isn't it a fact that when you place a man under arrest, you are to designate to him why he is arrested?

THE COURT: Don't answer that question.

By Mr. DI LEO:

Q. When did you return to police headquarters that evening?

A. After that.

Q. What time?

A. I couldn't give you the exact time.

Q. Was it 11 o'clock?

A. It could have been.

Q. Did you place any charge against Robert Judd at that particular time?

Mr. BACON: If Your Honor please, I am going to object to any question like this. I do not see how it is material to this case.

THE COURT: He may ask whether a charge was placed.

THE WITNESS: He was booked, and the charge was left open.

By Mr. DI LEO:

Q. What was that charge?

A. It was housebreaking, later. At that particular moment the charge was not entered on the book.

Q. In other words, you held him at that time?

A. That is correct.

48 Q. When was the charge of housebreaking placed against Mr. Judd?

A. I couldn't tell you the exact time. The books of the Detective Bureau will show it, but Sergeant Friel handled the final charge. We had been working all day long. He handled the final papers, because he was working midnight.

Q. Would you say the charge was placed against him on the 25th or the 26th?

THE COURT: Unless the witness knows, you are wasting time.

By Mr. DI LEO:

Q. Well, if you know, was the charge placed on the 25th or the 26th of March?

A. It was placed against him sometime, I imagine——

By THE COURT:

Q. Do not say what you imagine. If you do not know the date, say so.

A. Previously to 9 a. m. on March 25.

THE COURT: Read me that answer.

(The last answer was read by the court reporter.)

THE COURT: Very well.

By Mr. DI LEO:

Q. Did you interrogate Judd at the time you met him at White's house?

A. I did.

50 Q. Did you question White there further?
A. I did.

Q. Did he admit or deny any participation in anything you discussed relative to housebreaking?

A. He denied everything.

Q. Did you or did you not say, when asking Judd what he was doing there, that he said he had just come up for a visit?

A. That is correct.

Q. Did he or did he not tell you at that time that that was the first time he had been in there for quite a while?

A. He said—That is correct.

Q. You said also, then, that Harvey mentioned the name of Judd that day; is that right?

A. That is correct. We identified him that day, yes—or Bob—I don't know what. I showed him pictures we had, and he identified the picture.

Q. Harvey was there only that month of March?

A. I don't understand.

Q. Harvey was in that house only for the month of March?

A. As far as I know. That is what he informed me.

Q. You also stated that you heard some conversation or that this Harvey had told you White mentioned that he would get a cut of \$2,500?

51 A. The words used were, "My cut should be \$2,500.
I planned the job.

Q. You obtained knowledge that only \$1,600 was taken in this alleged housebreaking?

A. In cash. The amount carried on our books is twenty-five hundred and some odd dollars.

Q. When you took Judd back to headquarters from 908 Eighth Street, you were present when they booked him on an open charge?

A. I was.

Q. Were you there and did you help in searching Judd at that time?

A. No; a uniformed man searched him there for that.

Q. Did you at the time you placed him under arrest at 908 Eighth Street search him?

A. I frisked them.

Q. Did you search him?

A. I did.

Q. When you were at headquarters, you said, a uniformed man took the equipment and property of Judd; is that right?

A. A uniformed man in the cell block searches him, and he enters that notation on the book.

Q. Were you present then?

A. Yes, I was down there then.

Q. How much cash did Mr. Judd have on his person then?

A. I couldn't tell you.

52 Q. Wasn't it seven dollars?

A. It could have been.

Q. Did you go, in company with other members of the police department, on the morning of the 24th of March, 1950, to a place called the Standard Transfer & Storage Company?

A. No, sir.

Q. You did not go there?

A. I did not.

Mr. DI LEO: I believe those are all the questions I have.

Mr. BACON: No further questions.

* * * * *

WILLIAM W. FRIEL, resumed the stand and, having been previously duly sworn, testified further as follows:

Direct examination (Resumed).

By Mr. BACON:

Q. Sergeant Friel, you were telling us that you had looked around the interior of the Standard Transfer & Storage Company. Would you tell us what you found, if anything, in the interior?

A. Well, I found a safe had been ripped open. I found a shoe print.

53 Q. Where did you find the shoe print?

A. On top of a pasteboard box like that (indicating). The print of the whole shoe was there—the sole, rather.

Q. How was this place entered, if you know?

A. It was entered through a window on the west side near the rear.

Q. Where was this box in relation to that window?

A. Just on the right side of the window.

Q. Lower than the window?

A. That is right.

Q. What did you do with the shoe print?

A. We took the box on into the office proper, and by that time——

Q. What office are you speaking of?

A. Of the Standard Transfer & Storage Company. This part was out in the warehouse, where they entered.

I took it in the office, and Private Masters, from the Identification Bureau, cut the top of the box out. We left at that time and left that print with him.

Q. Did there come a time when you met Robert Judd later that day?

A. Yes, sir.

Q. Where did you meet him?

A. At police headquarters.

Q. Did you leave police headquarters with him that
54 evening?

A. Not that evening; the next morning. This was just before midnight when I met him.

Q. What time did you leave headquarters with Mr. Judd?

A. Oh, a little after one.

Q. Where did you go?

A. Went to his house.

Q. Did you go into his house?

A. I did.

Q. Did you make a search of his house?

A. I did.

MR. DI LEO: May we approach the bench, sir?

THE COURT: Yes.

(At the bench:)

MR. DI LEO: May it please the Court, I am going to object to the admission of the shoes and articles of clothing, based on these grounds: First, there was no right of search

which can be classed incident to the arrest. There was no search warrant issued to those premises. Thirdly, there was no justification or ground for them to make a search without a proper warrant, under the Fourth Amendment.

I further wish to object on the ground that they forced the defendant Judd to accompany them against his will to headquarters at 2 o'clock in the morning. They entered his premises against his will and against the will of his wife, and a search was made at that hour of the morning.

55

THE COURT: Whom do you represent?

Mr. DI LEO: I represent Judd, sir.

THE COURT: Was not this motion passed upon before?

Mr. DI LEO: It came up before Judge Holtzoff.

THE COURT: And he overruled it?

Mr. DI LEO: He overruled that motion, if the Court please. Because of the facts, I wanted to present evidence at that time, and there was no evidence other than, I think, one or two of the detectives, or one of them, I believe, and Mrs. Judd. Mr. Judd did not testify.

THE COURT: I overrule the motion.

(After leaving the bench:)

By Mr. BACON:

Q. Sergeant, I am going to show you a pair of shoes that have been marked as Government Exhibit 3 for identification. Can you identify these shoes, sir?

A. Yes, sir.

Q. How can you identify these shoes?

A. A clip staple in each tongue.

Q. Did you place that staple in the tongue of each shoe?

A. No; Sergeant Lubore did in my presence.

Q. Where did you get these shoes?

A. I got them out of Judd's room.

56

Q. At what time?

A. About one—a little after one. One-fifteen; something like that.

Q. What did you do with these shoes after you got them out of Judd's room?

A. We brought those shoes back to headquarters and, with the print, we sent them to the FBI.

Mr. BACON: The Government moves to admit Government Exhibit 3.

THE COURT: I will not admit them until counsel have cross-examined the witness.

MR. BACON: Do counsel wish to cross-examine as to this point?

THE COURT: Unless they are connected in some way with other testimony, they would not be admissible anyway.

MR. BACON: That is right, Your Honor. I have no further questions of the Sergeant.

THE COURT: Cross-examine.

Cross-examination

By Mr. DI LEO:

Q. Sergeant Friel, when did you first see Judd at headquarters with respect to the 24th day of March?

A. I saw him on the 24th.

Q. What time did you see him?

A. Just before midnight.

57 Q. Did you have any conversation with him at that time?

A. No, not right at that minute.

Q. Did you have any conversations from the time you first saw him at headquarters that evening until about one or two o'clock?

A. I did.

Q. How many times did you and other members of the police department talk to him?

A. I talked to Judd twice.

Q. You came into headquarters that night at what time?

A. Just before midnight.

Q. You left there about what time?

A. About 1:15.

Q. Now, Sergeant Friel, who went with you or who accompanied you to Judd's home, where he was living?

A. Sergeant Lubore, Sergeant Talbot, Sergeant Sisson, and myself.

Q. You would say five?

A. Judd would make the fifth one.

Q. Four detectives?

A. Four detectives and Judd.

Q. Did you tell Judd where he was going when you took him away from headquarters that morning?

A. I did.

58 Q. You told him he was going to his home?

A. I did.

Q. Was he handcuffed or not?

A. He was.

Q. Had any charge been placed against him up to that time?

A. No, sir.

Q. Was Judd in the cell block at No. 1 when you took him out that morning?

A. He had been in there.

Q. When the four detectives left—three others and yourself—was Judd down in the cell block?

A. No, sir.

Q. Had you brought him upstairs?

A. He was in the Safe Squad office.

Q. Did you have any conversation with Judd with respect to this housebreaking at the Standard warehouse?

A. I did.

Q. Did he admit or deny it?

A. He denied it.

Q. When you took him away from headquarters that morning, you say it was about 1:00 or 1:30?

A. About 1:15.

Q. That would be the morning of what?

A. The 25th.

59 Q. Whose car did you go over in?

A. In a headquarters cruiser.

Q. When you arrived at Judd's home, 906, I believe it is, Maryland Avenue, Northeast, who opened the door?

A. Judd opened the door. It is a rooming—

Q. Did he have a key in his possession at that time?

A. No, sir.

Q. Who had the key?

A. Sergeant Talbot.

Q. Did Sergeant Talbot put in Judd's key?

A. No, sir.

Q. Did he release the handcuffs for him to open the door?

A. No, sir.

Q. Who went in the house first?

A. Judd.

Q. Judd did?

A. Yes.

Q. With the four of you gentlemen behind him?

A. That is right.

Q. Did you go up to Mr. Judd's room, where he was living in that house?

A. Mr. Judd's room is on the first floor front.

Q. Who knocked at the door?

A. I did.

60 Q. Was the door open?

A. Not at that time.

Q. Who answered the door?

A. His wife said, "Who is there?" At least, a lady there—I later found out it was his wife—said, "Who is there?"

I said, "The police."

She said, "Just a moment."

In about two or three minutes she opened the door and said, "My God! What's happened?"

I told her her husband had been in a little trouble; we would like to come in and look the apartment over. She invited me in.

Q. Isn't it a fact that when the door was partially open, you, Sergeant Talbot, Sergeant Sisson, and the other detective—I have forgotten his name—shoved the door in and knocked Mrs. Judd clean back on the floor?

A. We certainly did not.

Q. Did you begin to search that apartment?

A. Yes, sir.

Q. Did anyone object to your searching the apartment?

A. No, sir.

Q. Didn't Judd tell you that you had no authority to search that apartment?

A. No, sir.

61 Q. Did you tell him to keep his mouth shut?

A. I did not.

Q. Did any other member of the police department there tell him to keep it shut?

A. No, sir.

Q. Did Mrs. Judd ask you what you were doing there?

A. She did.

Q. Didn't she object to your searching her apartment?

A. No, sir.

Q. Didn't you, Sergeant Talbot, or Sergeant Sisson keep the two apart so that they could not converse with each other?

A. We did.

Q. Isn't it a fact that one of them had asked what reason you had to search the apartment?

A. No, sir.

Q. Did you proceed, or did other members along with you proceed, to search closets and drawers of the bureau?

A. The first thing when I went in there I saw the shoes on top of the cabinet. I myself went in the first closet. I asked his wife what pants he had on the night before. She

showed me the trousers he had on and took them out herself.

Q. Where were these shoes kept?

A. They were on top of the cabinet.

Q. You could see them?

62 A. Yes.

Q. You went right over and picked them up?

A. Yes, sir.

Q. You did not ask her?

A. I told her I was looking for a pair of shoes when I went in there.

Q. I thought you said you saw the shoes the minute you entered.

A. I did.

Q. You just said a minute ago you went right over and picked them up.

A. Right after I told her I was looking for a pair of shoes.

* * * * *

63 Q. About these keys, Sergeant Friel: Didn't Officer Talbot take these keys at headquarters from the property of Mr. Judd that was in an envelope at

64 No. 1? Didn't Sergeant Talbot keep those keys in his possession until the house was entered?

A. Yes, sir.

Q. Now, wasn't there a camera and other articles taken at the same time—a pair of glasses?

A. You say did I take them?

Q. Weren't they taken at that time, when you took the shoes?

A. Yes, sir.

Q. They were returned also to Mr. and Mrs. Judd, weren't they?

A. Yes, sir.

* * * * *

65 Q. Now, how long did you remain in that apartment where Mrs. Judd and Mr. Judd lived, or where Mrs. Judd was living at the time?

A. Oh I guess 20 minutes, maybe. Close to that. Anyway, 20 or 25 minutes.

Q. Did she or did she not tell you that she and her husband were together that entire day?

A. She did.

Q. Did she or did she not tell you——

A. Excuse me. Which day do you mean?

Q. The 24th.

A. The day of the 24th? Yes, sir, she did.

Q. Didn't she tell you she had just left her husband a few hours before, after coming from a movie?

A. I don't recall the exact time. It was that evening. She said she had been to a movie.

Q. With her husband?

66 A. With her husband; that is right.

Q. After Mr. Judd returned with you gentlemen to headquarters, did you have any further conversation with Judd about this Standard warehouse?

A. Yes, sir.

Q. Did he admit or deny it then?

A. He denied it.

Q. One more point, Sergeant Friel: Did you go over to the Standard Transfer & Storage Company on the morning of the 24th of March?

A. Yes, sir.

Q. What time did you go over there?

A. I was working midnight. I got a call to go over there about 7 a. m. We arrived about 7 a. m.

Q. When you say this room was broken into, is it on the first floor on the west side of the building?

A. Yes, sir.

Q. The west side of this warehouse; is that right?

A. Yes, sir.

Q. Sergeant Friel, where that window is alleged to have been broken into, what was the material on the ground? Was it cement, asphalt, dirt, or anything else? Gravel?

A. It was dirt—real dark, black dirt.

Q. Was it soft?

A. I don't recall whether it was soft or not.

67 Q. You don't? You looked it over carefully, though, did you not?

A. Oh, yes.

Q. But to the best of your knowledge, it was dirt?

A. Yes.

68 WILLIAM W. FRIEL, resumed the stand and, upon examination, testified further as follows:

Redirect examination.

By Mr. BACON:

Q. Sergeant Friel, you stated you saw a foot print on a box under a window on the west side of this warehouse. Do you know what became of that foot print?

A. Well, it was sent to the FBI.

Q. I mean that particular morning, now.

A. That morning? It was taken into the office proper of the Standard Transfer & Storage Company.

Q. The office?

69 A. The whole box; and the top was cut out, or the part the foot print was on was cut out.

Q. By whom?

A. By Private Masters, of the Identification Bureau. I think the complainant was there at the time. That foot print was brought to headquarters by him and turned over to Sergeant Lubore and myself.

Q. What did you do with it?

A. We took the foot print to the FBI with the pair of shoes.

Q. You are speaking now, when you say "pair of shoes," of Government Exhibit 3 for identification?

A. That is right. The foot print—I mean the cardboard with the foot print on it—and the shoes was returned to us and was taken to the Commissioner's office the day we had the hearing. Since then I have not seen it.

Q. Now, sir, have you looked for this cardboard with the foot print on it today?

A. Ever since this case started.

Q. Where have you looked?

A. All over the office of the Safe Squad. I have had men checking all through the property clerk's office, and it can't be found.

Q. You have not been able to locate it?

A. No, sir.

Mr. BACON: I have no further questions, Your Honor.

70 Recross-examination.

By Mr. DI LEO:

Q. Sergeant Friel, you stated that you were there the morning of the 23rd or the morning of the 24th.

A. Where?

Q. At the Standard Storage Company's warehouse, or whatever it is.

A. Yes, sir.

Q. While there you saw a foot print on a box?

A. Yes, sir.

Q. Where is that foot print now?

A. I don't know. It is apparently misplaced.

Q. You also stated that you had it at the Commissioner's hearing?

A. Yes, sir.

Q. Would you tell the Court and jury when you had it before the Commissioner's office?

A. The 24th.

Q. What day?

A. The 24th—25th; I am sorry.

Q. Isn't it a fact, sir, that there was not a hearing in the Commissioner's office until some three weeks after the 23rd or 24th?

A. You are right, but I don't remember the date.

71 Q. Wasn't it about three weeks after the 24th that you came before the Commissioner with that particular box or carton, or whatever it was?

A. I think you are right, sir.

Q. Sergeant Friel, when did you turn it over to the FBI?

A. On the 28th of March.

Q. Then, you had it in your possession from the 24th of March until the 28th of March; is that correct?

A. Yes, sir.

Q. Where did you have this top of a carton? Did you keep it at headquarters?

A. It was in a cellophane sealed package, like. It was put in there by Private Masters.

Q. On the 28th you turned it over to the FBI?

A. Yes, sir.

Q. As you have so stated, that was about three weeks from the 24th that you brought it before the Commissioner?

A. Yes, sir.

Q. Who was with you when you took this carton cover off the box? Who was with you at the time?

A. I didn't take it off.

Q. Who did, if anyone?

A. Masters—Private Masters.

Q. Private Masters took this cover?

A. Yes, sir.

72 Q. Where was this box located—this carton-box—carton-container?

A. You mean in the beginning?

Q. Yes. Where did you first see the carton-container?

A. Under the window that was entered.

Q. When you say, "Under the window," how far was the window from the ground?

A. Oh, I would say five feet, approximately.

Q. The window was five feet from the ground level?

A. That is right.

Q. With respect to the interior of that room, where would you say the box was with reference to the window that is alleged to have been opened or entered into?

A. In that particular warehouse, there was just, I guess, hundreds of cartons—of cardboard boxes.

Q. Where was this particular carton box?

A. Under the window inside the building.

Q. Do you mean directly underneath or to the side?

A. I don't know whether it was directly underneath. It was inside the building, near the window, right under the window.

Q. You saw this container when you entered the house?

A. I did.

Q. To the best of your knowledge, could you say whether it was to the right or to the left of the window?

73 A. I would say it was to the left of the window, facing the window from inside.

Q. Facing the window from the inside, you would say it was to the left?

A. That is right.

Q. Right as you came in?

A. That is right.

Q. Was this box by itself—laying down by itself?

A. No; it was on top of another box.

Q. It was laying on another box?

A. Yes.

Q. Was it on the floor or on the table?

A. On the floor.

Q. You say it was about a five- or six-foot drop from the window?

A. On to the ground.

Q. Where this carton box was?

A. That is right.

Q. Did this box contain any material or equipment?

A. It contained something. I don't know what was in it.

Q. Was it open?

A. No, sir.

Q. How long a box was it, Sergeant?

A. Oh, it was a little larger than this piece of paper here—the top of it—side of it.

74 Q. You don't know what it contained?

A. No.

Q. Did you remove the cover?

A. No.

Q. The cover had been removed while you were there?

A. No. He started to cut it while we were there—cut the top of it.

Q. You did not see what was in it—the contents?

A. No.

Q. You don't know whether this box was empty or full, do you?

A. I know there was something in it, because I carried it back.

Q. Carried it from where?

A. From the warehouse into the office.

Q. Oh, you did?

A. Yes.

Q. Was the top flap open?

A. No, sir; sealed.

Q. You say it was a small carton?

A. Yes.

Q. When did you get the report back on that pair of shoes?

A. I would have to look at the FBI sheet.

Q. Roughly speaking.

75 A. I have a report here from the FBI.

Q. From your own recollection, sir, from the day you gave it to them, on the 28th—four days after that, on March 28th—until the hearing before the Commissioner about three weeks later, can you fix the time that you had this report?

A. I don't recall.

Q. Would you say it was a day or two before the Commissioner's hearing?

A. I don't recall.

ALPHEUS B. MASTERS, was called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. BACON:

76 Q. Give us your full name and assignment, please, officer.

A. Alpheus B. Masters. I am assigned to the Bureau of Identification.

Q. Officer, on the 24th of March did you have occasion to go to the Standard Transfer & Storage Company?

A. I did, yes, sir.

Q. When you got there, what did you do?

A. When I arrived there, Sergeants Lubore and Friel were there, and we examined the premises for possible physical evidence. We examined the premises for fingerprint evidence also.

Q. Did you find any fingerprint evidence?

A. I did, yes, sir.

Q. Did you find any physical evidence other than the fingerprints?

A. I did, yes, sir. On the window that had been broken, or rather underneath the window that had been broken, there was a number of cartons piled up, and on top of one of those cartons was a shoe impression.

Q. What happened to that shoe impression? What did you do with that shoe impression that morning?

A. I took my knife and cut the top off of this carton it was on and brought it to the Bureau of Identification.

Q. Did you place anything on that top that had the shoe impression on it?

77 A. I did, yes, sir.

Q. What did you put on there?

Mr. DI LEO: I wish to object for the purpose of the record. I think the best evidence is the top of the carton itself.

THE COURT: I overrule the objection.

THE WITNESS: I put my initials.

By Mr. BACON:

Q. What are your initials?

A. A. B. M.; the address, and the address I used was Fourth and Bryant Streets, Northeast; and the date which was 3/24/50; and I believe I also wrote down "Standard Transfer Company."

Q. After you removed that top from the carton, what did you do with the top?

A. I took that to the office of the Safe Squad and turned it over to Sergeants Lubore and Friel.

Mr. BACON: I have no further questions.

Cross-examination

By Mr. DI LEO:

Q. Do you have that cover in your possession?

A. No, sir.

Q. Have you had it in your possession since the 24th of March, 1950?

A. I haven't seen that top since I turned it over
78 to Sergeants Lubore and Friel.

Q. Didn't you say a moment ago that you carried it up in a box to the FBI?

A. No, sir.

Q. Did you ever turn it over to the FBI?

A. No, sir.

Q. What time in the morning did you visit the premises of the Standard warehouse?

A. I arrived there shortly before 8 o'clock in the morning, probably about quarter of eight.

Q. Were any other officers there with you?

A. Sergeants Lubore and Friel.

Q. Did you enter the premises about the same time they did?

A. No, sir.

Q. Did you enter before them?

A. No, sir.

Q. After them?

A. That is correct.

Q. Now, with respect to this carton, about which you spoke to the ladies and gentlemen of the jury and to the Court, where was this carton, Officer, with respect to the window?

A. Well, there was a number of cartons piled underneath the window, and facing the window from the
79 inside, looking outward through the window, it would have been slightly towards the left of the window.

Q. How many cartons would you say were beneath this particular carton?

A. I couldn't say definitely. The only answer I could give would be an estimate.

Q. About how many would you say?

A. Well, I would judge that they were—that this carton that I am speaking about, the one I cut the top off of, was probably about four feet off the ground—that is, off the floor—and I imagine it was probably about possibly six cartons to cover that height.

Q. Would you say this was approximately the sixth one from the floor?

A. Approximately, yes.

Q. Was that the first time this carton box was noticed, as far as you know?

A. I don't understand.

Q. Was this the first time the carton box came in prominence at any time, when you examined it?

A. That I couldn't say.

Q. Did anyone else call your attention to that carton being there?

A. Sergeants Lubore and Friel said they had something to show me when we were back there, and among the things that were shown me was that, but this wasn't pointed out in particular, that I recall. Also there was——

Q. Just this one box I have reference to.

A. Yes.

Q. That box was still up about four feet?

A. That is correct.

Q. It was approximately the sixth carton from the floor?

A. That is right.

Q. Then, you would put that almost about a foot or so from the window; is that correct?

A. No; I would judge it was probably at least six feet out from the window.

Q. Six feet out from the window?

A. That is correct.

Q. If this were the window, would you say it was six feet out?

A. That is inside looking outward. It was approximately six feet inside the window, slightly to the left of the window.

Q. Was there anything directly underneath the window?

A. Yes, there was cartons piled right up to the lintel of the window sill.

Q. Did you get any prints off those cartons directly underneath the window sill?

A. No.

81 Q. You did not. This particular box you took the cover off: Was it empty or full?

A. It had china in it. I don't recall what type china it was. That is the best of my memory.

Q. Chinaware?

A. Yes.

Q. Was there anything broken in this carton, to your knowledge?

A. I didn't notice anything in particular, but I don't believe there was.

Q. You don't believe there was?

A. No.

Q. Did you remove the carton at that time from where it had been stacked up four feet high about six feet from the window? Did you remove the carton?

A. I brought it from where it was found originally into the office and took—cut the top off of it there.

Q. Sergeant Friel did not take the carton from that room and bring it into the other room?

A. No.

Q. You brought it there yourself?

A. I did, yes, sir.

Mr. DI LEO: I believe that is all.

Mr. BACON: No further questions.

(The witness left the stand.)

82 Mr. BACON: Mr. Thompson.

Mr. DI LEO: May it please the Court, may I ask the gentleman one more question?

THE COURT: Very well. Step back.

(The witness Masters resumed the stand, and the following occurred:)

By Mr. DI LEO:

Q. Private Masters, you stated you examined the outside—exterior—of the place?

A. Yes, sir, I did.

Q. Did you observe whether or not the base of the building, underneath the building—that is, underneath the window—was concrete or dirt?

A. Well, there may have been portions of it was concrete, but I definitely remember that there was parts of it that was ground, because it was very muddy that morning.

Q. In other words, it was concrete, would you say, directly below the window?

A. I wouldn't say that there was concrete or there wasn't, because I don't definitely remember, but I say I do definitely remember that there was ground there, because it was very muddy.

Q. Did you say gravel?

A. Ground.

Q. Ground?

83 A. That is right; yes, sir.

Q. Had it rained that night, sir?

A. I don't recall whether it did or not.

Q. Was the ground wet underneath the window?

A. It was. It was very wet and muddy.

Mr. DI LEO: That is all. Thank you, Your Honor.

CURTIS E. THOMPSON, was called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. BACON:

Q. Would you give us your full name and occupation, sir?

A. Curtis E. Thompson. I am a special agent of the Federal Bureau of Investigation.

Q. What is your job with the Bureau?

A. I am assigned to the FBI Laboratory, and my assignment includes technical examinations of physical evidence found at scenes of crimes, including such things as footprints, tire treads, and other types of evidence that leave impressions on paper and other mediums.

* * * * *

85 Q. Mr. Thompson, in the course of your duties there, did you receive from the office of the Metropolitan Police—Sergeant Friel in particular—a piece of cardboard with an impression on it?

A. Yes, I did.

Q. Do you recall about what time you received that or about what the date was?

A. It was either on the 28th of March of this year or the next day.

Q. You kept that in your possession there at the FBI headquarters?

A. Yes, for a number of days.

Q. Did you make any photographs of this?

A. Yes, sir.

Q. Did you make these photographs (indicating)?

A. Yes, sir. I made them with the photographer. I didn't actually click the shutter myself; the photographer I was with did.

Mr. DI LEO: May I make the objection at this time that I have already stated? I just want to renew my motion.

THE COURT: It has not been offered in evidence.

Mr. DI LEO: I mean they are describing something that does not exist here.

THE COURT: I overrule the objection. I am not ruling on the admissibility of it.

86 By Mr. BACON:

Q. You were present when the photograph was taken?

A. That is correct.

Q. Did you examine the photograph after it was taken?

A. Yes.

Q. Did you compare the photograph that was taken with the impression on the piece of cardboard?

A. Yes.

Q. Do you have here the negative of the picture that you took?

A. No, I don't have the negative; I have only the copy of the photograph—photographic copy.

Q. Who made that enlargement?

A. That was made under my supervision but by a photographer.

Q. You were present when this enlargement was made?

A. Through portions of the work, yes.

Q. Did you check that enlargement against the impression on this piece of cardboard?

A. Yes.

Q. Did the enlargement you have match up with the print on the cardboard?

A. Yes. With the exception of being larger, it is a true and faithful reproduction.

Q. I show you Government Exhibit 3 for identification, a pair of shoes. Have you ever seen these shoes before, sir?

87 A. Yes, I have examined these also.

Q. Where did you see these shoes?

A. They were turned over to me at the same time as the piece of cardboard.

Q. By Sergeant Friel?

A. Yes.

Q. Did you take photographs of these shoes?

A. Yes, sir.

Q. Did you actually take the photographs.

A. They were taken in the same manner and at the same time as the other one I spoke of.

Q. Did you examine the photograph that was taken of the shoes as compared with the shoes themselves?

A. Yes, I did.

Q. Would you say, in your opinion, that it is a faithful reproduction of the shoe itself?

A. That is right.

Q. Do you have those photographs with you, Mr. Thompson?

A. Yes. I don't have the photograph of the—enlarged photograph of the shoe. Here is a reduced photograph of the shoe. The actual enlargement that I have is of sample impressions I made myself of the shoe.

Q. Do you have with you the photograph that you took of the piece of cardboard with the impression on it?

88 A. Yes, I do.

Q. Where is that?

A. I have that here.

Q. Give me the photograph of the shoe.

A. This is an enlargement of the impression on the piece of cardboard.

Mr. DI LEO: May it please Court, I wish to make objection to the admissibility of the picture.

THE COURT: It has not been admitted in evidence yet.

By Mr. BACON:

Q. I want to show you Government Exhibit 4 for identification. Will you identify that for me, please?

A. This is a photograph of the bottom of the left shoe.

Q. Were you present when that photograph was made—the one you have in your hand?

A. Yes—not actually when the print was made, but when the photograph was made.

Q. I am now going to show you Government Exhibit 5 for identification. Would you tell us what that is? Identify that for me.

A. This is an enlargement of the impression.

Q. Just tell me what it is.

A. Of the impression that was—appeared on the piece of cardboard that we mentioned.

Q. You were there when the photograph was taken
89 of the piece of cardboard?

A. That is correct.

Q. You checked this enlargement you have made there against the impression of the cardboard for accuracy?

A. That is right.

Mr. BACON: At this time the Government would like to offer Government Exhibit 3, the shoes; Government Exhibit 4, a picture of the shoes; and Government Exhibit 5, a picture of the impression made on the piece of cardboard.

THE COURT: Step to the bench, please.

(At the bench:)

THE COURT: Has anyone testified that he personally delivered this particular piece of cardboard to this man?

Mr. BACON: Sergeant Friel testified to that, sir: that he took it down to the FBI and delivered it to the laboratory there.

THE COURT: To the laboratory?

Mr. BACON: Yes, Your Honor. I do not know whether he personally handed it to Thompson. The normal procedure is that they turn them in to the laboratory there. I do not believe they ever turn it over to the actual laboratory technician who works upon it.

THE COURT: As I recall, didn't he state that he himself put his initials on it?

Mr. BACON: Mr. Masters, who cut the top out, 90 placed his initials and his name on the top. Then he turned the box over to Sergeant Friel, who in turn took it to the FBI, where Mr. Thompson received it.

THE COURT: Did he put his initials on this same piece of paper or cardboard that was turned over to the laboratory?

Mr. BACON: Yes, sir.

THE COURT: Well, there is no evidence that there were any initials on this piece of paper that was examined by this witness.

Mr. BACON: I had not got to that. I did not want to go into details.

THE COURT: You will have to go into that before I can admit this in evidence.

Mr. BACON: I will go into it now.

THE COURT: I am very doubtful.

Mr. BACON: We may as well go into it now. The Government's position is that the Government relies on this picture as secondary evidence. We have made a diligent search for the primary evidence, which is the actual piece of cardboard, but we have not been able to locate it. However, we do have a faithful reproduction, which is secondary evidence and the best evidence the Government has to offer at the present time. In the Government's opinion, it is admissible if the Government has made diligent search for the primary evidence but cannot locate it.

91 If this were a narcotic case, sir, and the chemist had taken the cigarette and completely devoured it, he would testify as to what he did with the cigarette, but the cigarette would not be physically in court. I think that is analogous to this case, where a piece of cardboard is not actually in court, but we have the man who has examined the piece of cardboard.

THE COURT: I will let it in, but I may have to set the verdict aside if it is based on that.

Mr. BACON: The verdict will have to be based on that, because that is the only thing the Government has as far as the defendant Judd is concerned.

THE COURT: I overrule the motion.

Mr. DI LEO: Your Honor, I state now that counsel stated that they had made a diligent search. As Your Honor well knows, though, they had it until this morning. How could they have made a diligent search when they announce they have not been able to locate it? We do not know, in the interim, from the time this particular carton top was delivered to the FBI, and four or five days after it had been obtained originally, what had ensued from that time to the time in which they had it. Turning it over to them does not mean it was turned over to this particular agent.

THE COURT: I overrule the motion. This may be a matter of argument to the jury, but I overrule the motion.

92 Mr. DI LEO: All right. Thank you, Your Honor.

THE COURT: I do not mean you may argue the admissibility, but you may argue to the effect of the continuity of circumstances in tracing this particular piece of paper through. You may argue that, of course.

(After leaving the bench:)

By Mr. BACON:

Q. I show you Government Exhibit 5 for identification. Do you see any writing on that picture?

A. Yes, there is a date, and it has the initials of some individual.

Q. Was that date and were the initials on the picture when you received it?

A. Yes.

Q. Would you read that for me, please?

A. I believe it to be 3/24/50, evidently for the date; Fourth and Bryant, Northeast. I don't know if I can—I believe it is "Standard Tfr.," "P.O." I don't know if I can read that correctly. It is not entirely legible.

Q. Is there anything else on there?

A. Yes, sir, there are initials which appear to be "F.B. M."; or the first one may not be "F" but it looks as if it is.

93 Q. You made an examination of the pictures and the shoes that you have there, and the picture of the imprint on the top of the carton. In your opinion, were they made by the same shoe?

A. The impression that I found on the piece of cardboard, I believe, was made by the left shoe.

Q. Would you tell us, sir, briefly, how you arrived at that conclusion?

A. I can demonstrate with this enlargement, if you would like to have me.

94 By Mr. BACON:

Q. Were you present when that photograph was made?

A. Yes, sir.

95 Mr. BACON: The Government moves to admit Government Exhibit 6 in evidence.

THE COURT: It may be admitted. I take it you are objecting to all of these?

Mr. DI LEO: I am objecting to all of them.

* * * * *

97 In trying to find things that were peculiar only to this left shoe, I tried to find little imperfections that are caused by a person wearing a shoe, like cuts, bruises, wear, or another place it had not been worn. I was able to find—as a matter of fact, I found more little defects on this particular shoe than any I have ever examined.

Mr. DI LEO: I think that should be stricken, if the Court please.

THE COURT: I sustain the objection to that. The jurors will disregard that statement.

98 THE WITNESS: Some of those I will point out to you. I have red markers on the board. Take, for instance, this little red line I have drawn here to the point of the shoe. If you will follow the contour of that particular square on that particular position and glance over to the known specimen I have, you find that same contour follows in that particular position.

If you look at this arrow on the upper right-hand corner, you will notice an old jagged edge follows in that square along the top. That same thing is found in this particular specimen—that jagged edge.

You look over and glance at this particular square or portion of the square. Actually it is shaped very oddly. This portion of the square that is more like an acute triangle (indicating). You will find that it is shaped similar to that here—that red outline. That same outline appears on the known specimen.

Look down at the contour of this square, on which I have placed a line across the top. Follow that across to this

particular square. Superimpose it in the exact position, and you find the contour of that is exactly the same.

In the square immediately above it, the corner is knocked off that point. That is true also of the known specimen that I took. If you will follow over to the outside of the shoe, notice this red line I have, where that corner is rounded in that particular square. The same thing is true on
99 the questioned pattern.

On that same portion there is a little dug-out place that did not print there. That also appears there in this square.

Glancing down to the hole in these imperfections that are showing there, this portion is shaped like the top of that particular square. The print is the same way in this questioned pattern.

This little line appearing there, with that top portion of that particular square—that also appears on the questioned pattern.

Some of these look like a sand clot. Notice this particular one in this position: triangular on the bottom and triangular on the top. It also appears in the same position in the questioned pattern.

Those I have pointed out, and many other defects that I found on the shoe, I also found on the questioned pattern.

100 Q. From your examination now, would you tell us your conclusion?

A. I concluded that this left shoe (indicating) produced the impression which appeared on that piece of cardboard.

Q. That is the piece of cardboard delivered to you by Sergeant Friel?

A. That is correct.

Mr. BACON: I believe I have no further questions.

Cross-examination

By Mr. DI LEO:

Q. You say that was given to you by Sergeant Friel?

A. I don't recall the exact way it was handed to me.

Q. Why did you state now, in reply to counsel's question here, "Was that shoe given to you by Sergeant Friel?" that you don't know?

A. Well, my recollection. I would say that it was. I don't recall the exact incident, because I receive so much evidence from different places, and I don't recall the exact, particular incident here.

Q. Then, you know or you don't know whether Sergeant Friel gave you that shoe?

101 A. No; my best recollection is that he did.

Q. Isn't it a fact that you stated on direct examination that this shoe was brought to the laboratory on the 28th or 29th of March?

A. I believe I did, yes.

Q. And that someone else accepted that particular shoe?

A. I didn't say that, no.

Q. Doesn't the shoe go to the laboratory before you get it?

A. I am in the laboratory. It comes to the office. Generally I am called into the office to receive it.

Q. Do you have a notation that you accepted that shoe on that day?

A. No, I don't.

Q. Then, you don't know whether you did or not?

A. As I pointed out before, my best recollection is that I did.

Q. Did Sergeant Friel bring it up, or did Private Masters?

A. I believe I answered that as well as I could. I don't recall exactly. I believe there was more than one individual there.

Q. You are an expert on shoe prints; is that correct?

A. Yes, sir.

Q. From the prints you saw on that box, how heavy
102 would you say a man had to be to make that print?

A. I am not that kind of expert, so I wouldn't be able to say.

Q. You would not be able to say?

A. No.

Q. Would you be able to say whether a man dropping for four feet on to a box would make a heavier impression than the one you examined, or would it make a lighter impression if a man merely casually stepped on it?

A. Well, naturally, I think you could presume if a man jumped on a piece of cardboard, it would make a heavier impression than under ordinary circumstances—than just barely stepping on it.

Q. Suppose the window was six feet high, and a man dropped on to that particular carton, which is, say, about a two-foot carton, would you say it would make a heavier impression?

A. Well, generally, I think so, although it would be just a guess.

Q. You have had an opportunity to examine the original specimen that was brought to the laboratory. In your opinion, would you say it was a heavy foot or a light foot?

A. Well, I really couldn't say, because I wouldn't know exactly what the material was on the shoe itself that caused that impression. It would just be a guess in any event.

103 Q. Isn't it a fact that the impression that you had before you at the laboratory was a very clear impression—very light?

A. Well, I think it can be reflected by the enlargement. I don't know what you mean by "light."

Q. Well, I mean clear. Let us put it: clear without any smudging.

A. Well, I don't believe I could say that. It would be dependent on what you consider "without any smudging," and you would have to tell by looking at the impression itself.

Q. Well, you testified here that you recall the original top cover of this carton. Can you recall now whether or not it was a clear print or one that was muddled around?

A. Well, I will say very definitely that it was clear, as reflected in that photograph.

Q. It was clear?

A. Surely.

Q. You did not get these shoes until what date? The 28th or 29th; is that right?

A. That is right.

Q. You state to these ladies and gentlemen of the jury that the date on that is 3/24/50; is that correct?

A. That is what it looks to me like.

Q. You don't know when that was put on there, do you?

A. No, I have no idea.

104 Q. Of course, you did not get it until the 28th or 29th?

A. That is right.

Q. You couldn't tell whether that particular date was placed there between the 24th and the 28th?

Q. Now, Mr. Thompson, on this particular covering—this carton cover—did you find any mud marks, or was it just clear, as you show us by the photograph?

A. I photographed it immediately. I didn't enlarge it myself. It was photographed merely to show the
105 condition it was in when I received it.

Q. Clear?

A. Yes.

Q. You did not find any mud particles in here?

A. I didn't look for them, but I don't recall any.

Q. That is practically—the outside of the shoe—the wear and tear of handling it—that is practically the way you found the shoe?

A. I believe so. I don't notice any difference.

JOHN FOSTER, was called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. BACON:

Q. Give us your full name and occupation, sir.

A. John Foster; property clerk, Metropolitan Police Department.

Q. Now, sir, have you conducted a search today for a piece of cardboard with a footprint impression on it?

A. I have conducted a search—about three searches I think.

106 Q. Where did you look, sir?

A. I went to the Property Clerk's Office, where the records are kept. I have searched the records, and two other men searched the records, and we could find no record of it.

Q. Did you search the room where the physical property is kept?

A. Yes, sir.

Q. Did you find anything there?

A. No, sir.

Q. Do you have any idea where this cardboard with the impression on it is?

A. No idea.

Q. How long would you say you searched?

A. Well, I was over there three times. I would say 15 minutes each time; something like that.

Mr. BACON: No further questions.

Mr. DI LEO: No questions, may it please the Court.

(The witness left the stand.)

Mr. BACON: If Your Honor please, I should like to recall Mr. Foster for one question. He is the complaining witness.

Thereupon,

WILLIAM B. DOSTER, was recalled as a witness and, having been previously duly sworn, testified further as follows:

Direct examination.

107 By Mr. BACON:

Q. Mr. Doster, when you were at your place of business on the morning of March 24, 1950, did you see a box with a footprint impression on it?

A. Yes.

Q. Do you recall where you first saw the box?

A. Well, it was with some other stuff around. The warehouse was a little crowded.

Mr. DI LEO: May I object to this, may it please the Court?

THE COURT: On what ground?

Mr. DI LEO: This gentleman was in court the entire time of these other conversations about the various things.

THE COURT: I overrule the objection.

Mr. DI LEO: All right.

By Mr. BACON:

Q. Did you see the box with the impression on it?

A. Yes.

Q. Did you see what happened to that box?

A. Yes; they cut the top off of it.

THE COURT: I think you have gone over that by other witnesses.

Mr. BACON: All right, Your Honor; no further questions.

108 Mr. BACON: All right, Your Honor. The Government will rest its case.

109 Mr. DI LEO: On behalf of Robert Judd, I wish to make a motion for a directed verdict of acquittal on the ground of illegal arrest and illegal search and seizure.

THE COURT: I overrule the motion.

* * * * *

115 EUGENE H. SISSON, was called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. HARRIS:

Q. During the 24-hour period beginning at midnight of the 23rd and ending at midnight of the 24th, did you have occasion to go to 908 Eighth Street, Northwest?

A. I did.

Q. What was the purpose of your visit there?

A. I received certain information that the occupant and one or two other men in the second floor apartment, 908 Eighth Street, had committed a felony.

116 Q. Who was the informant in this case?

A. Do I have to state his name?

Q. If you know his name.

A. Harvey.

117 Q. When he gave you this information, how did you happen to connect this man here with it?

A. Well, I knew this man's record, and I associated him with this job.

Q. So without further ado, because of his record, you associated him with the job?

A. Well, I had him—his picture was identified that day at headquarters. Knowing his record, I associated him with that particular job.

* * * * *

120 Q. Then, after you found the checks, of course, you took White down and booked him on the basis of the checks; is that it?

121 A. We stayed there a while and waited for the other man to return.

Q. But the other man didn't return, though, did he?

A. Well, Judd came in.

Mr. DI LEO: I would like to have that stricken. He asked the question, but the other man didn't come in? The witness said, No; Judd came in. I do not think that is responsive. I do not think it is a proper answer to the question. He has given an inference to the jury that this man was the one who left. I think that should really be stricken. Unless he can positively say that Judd is the one who left prior to that, I submit that should be stricken from the record.

THE COURT: I overrule the objection.

Mr. DI LEO: I will just take the usual exception, Your Honor.

By Mr. HARRIS:

Q. Officer Sisson, you stated that on the basis of this man's past—

THE COURT: I do not think the jury can infer from that that the other man was Judd. The fact that Judd came in is perfectly relevant.

Mr. DI LEO: Does not Your Honor feel that it is absolutely beyond the answer to the question?

The Court: I have told the jury that they cannot
122 infer from that answer that the other man was Judd.

Mr. DI LEO: Oh, I see.

THE COURT: The fact that Judd came in is perfectly all right.

Mr. DI LEO: I was just interested in his inference.

THE COURT: Proceed.

* * * * *

128 By Mr. DI LEO:

Q. At the time Judd came to the room on the night of March 24, 1950, at or about 10 p. m., when you saw Mr. Judd there, was Lieutenant Cooper there?

A. I don't think he was there when Judd came in.

Q. You don't think so? Let me ask you this: How long were you in this adjoining room from the time you entered about 8 o'clock until the time this other man departed?

A. Probably about 30 minutes.

Q. This other man departed after 30 minutes; is that correct—after you had entered the house?

A. No.

Q. How long were you in the house before this other man left?

A. I was in the house, in the room, approximately—about 30 minutes, when they came in the room—when the two men came in White's room.

Q. Now, there were two men came into White's room; is that right?

A. That is what I testified to.

Q. You did not hear one voice? You heard one
129 voice and White's?

A. No, there was two men—White and another man.

Q. What did you mean when you said they came in?

A. I meant two men.

Q. Came in together?

A. Yes.

Q. Isn't it a fact, Officer, that when you first came to that room, there was nobody in the room when you came in the house?

A. What room?

Q. In White's room. The first time you entered that night, March 24, there was no one present?

A. Apparently not.

Q. Then, you did go in there prior to 8 p. m., didn't you?

A. I went in this informer's room, yes.

Q. How long were you in the informer's room, as you call him, before the two men came into White's room?

A. Approximately 30 minutes.

Q. That was about 8:30. How long did the two men stay in White's room?

A. A few minutes.

Q. What conversation did you hear?

A. They mentioned something about leaving town—mentioned Philadelphia.

130 Q. They mentioned that?

A. Yes.

Q. Did you hear anything drop or fall?

A. When they came in, something dropped on the floor, and there was a lot of drawers pulled out of dressers.

Q. Was that after you came in or after they came in?

A. After they came in.

Q. Did you recognize Judd's voice as being that of the other man?

A. No, I could not.

Q. Then, you don't know whether Judd was the other man who came in, do you?

A. No, sir.

Q. Did you take Judd into custody?

A. I did.

Q. Did you charge him at that time?

A. He was taken to headquarters and booked for investigation around 10—something like that—between 10 and 10:30.

Q. Between 10 and 10:30 that evening, March 24?

A. Somewhere around 10.

Q. When was that charge officially placed against Judd?

A. Sergeant Friel charged him. I don't remember exactly.

Mr. DI LEO: I believe that is all, if the Court, Please.

131 Further cross-examination.

By Mr. DI LEO:

Q. One question, Sergeant Sisson: Did you talk to Judd at any time about his participating in a crime of any kind at that particular warehouse? Did he admit or deny that he was with anyone at that particular time?

A. I was present when he was questioned about it.

Q. Did he admit or deny that he took anything?

132 A. He denied it.

Mr. DI LEO: That is all.

THE COURT: Step down.

(The witness left the stand.)

Mr. HARRIS: We have no further witnesses.

Mr. DI LEO: May I proceed, then, Your Honor?

THE COURT: Very well.

Mr. DI LEO: Call Kermit Judd.

Thereupon, KERMIT JUDD, JR., was called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. DI LEO:

Q. Keep your voice up and state your full name.

A. Kermit Judd, Jr.

Q. Mr. Judd, where do you reside?

A. Capitol Heights, Maryland.

Q. Are you married?

A. Yes, sir.

Q. Do you live in Temple Heights?

A. Yes.

Q. Do you have your own home?

A. Yes, sir.

Q. Did you live there during the month of March 1950?

133 A. Yes, sir, I did.

Q. Will you tell His Honor and the ladies and gentlemen of the jury whether you lived there on March 23, 1950?

A. Yes, sir, I did.

Q. Did you have occasion to see your brother—

Mr. DI LEO: I will withdraw that.

By Mr. DI LEO:

Q. Is Bob Judd related to you?

A. Yes, sir; my brother.

Q. Did you have occasion to see your brother on March 23?

A. Yes, sir, I did.

Q. Will you tell His Honor and the jury where and when?

A. Well, I got off of work around 5:30 in the evening, and my brother was waiting for me when I got off. My third brother picked us up in his car, which he always did every evening, and took us home, where we had dinner; and Bob has his car, which is wrecked, out at the place, and he went out to see what to do for it, whether to get rid of it or have it fixed.

Q. I don't believe the jury can hear you very well. I notice that they are bending over.

A. He went out to see about getting his car fixed or whether he wanted to get rid of it, and there was a light rain going on. It was dark by the time we got home
134 and after we had dinner, so he decided to spend the night there, and he came in with my brother, and we went to work the next morning.

Q. When you say your other brother, what is his name?

A. Glen.

Q. Did Bob have any other means of transportation to come in that night?

A. No, sir, he did not. My brother had already left.

Q. Was it clear or dry that night, or rainy?

A. There was a light drizzle.

Q. Was that automobile parked in your yard? Whom does it belong to?

A. The car?

Q. Yes.

A. It belongs to my brother.

Q. Does it run under its own power?

A. No; it is still there.

Q. Is it still there as of this time?

A. Yes, same place.

Q. Was it there as of March 23?

A. For about three weeks before that.

Q. Did Bob leave your home at any time during the night of March 23 or the morning of the 24th?

A. No, not until around 8 o'clock the next morning, when he and I came to work.

Q. Did he leave with you?

135 A. Yes.

Q. How was Bob dressed on the evening of the 23rd and the morning of the 24th?

A. He had on a dark blue suit with little specks in it—white specks—tan shoes, and a tan shirt.

Q. Was he dressed the same way when he came in with you that morning?

A. Yes, sir.

Q. What time did you leave Bob off in town?

A. I would say roughly around 8:30, because I was at work about quarter of nine.

Q. That was on the morning of the 24th of March?

A. Friday morning, yes, sir.

Q. Kermit, I will ask you to look at these shoes. Do you identify these shoes?

A. Yes, sir, I can.

Q. Keep your voice up. I know the jury are having trouble hearing you.

A. Yes, sir, I can.

Q. Whom do these shoes belong to?

A. I bought them myself down at 14th and F.

Q. What size are they?

A. They are 8C, I believe.

Q. You are sure about the size?

A. Yes. I know they are 8's; I believe they are C's.

136 Q. Did there come a time when you got rid of these shoes?

A. Yes, sir. They were too tight, and they hurt my feet. I gave them to Bob to give to my other brother, Carroll.

Q. Carroll is not the other brother at your home?

A. No; that is the fourth one.

Q. Where did you buy these shoes?

A. I believe it was Flagg Brothers; but it was 14th and F. I am pretty sure it was Flagg Brothers.

Q. What size does Bob wear?

A. A size or a size and a half larger than I do.

Q. You say you wear a 9 or a 9-1/2 shoe?

A. Yes.

Q. After Bob came in town about quarter of nine, did you see him any more that day?

A. No, sir, I didn't?

Mr. DI LEO: I believe that is all. Your witness.

* * * * *

141 KERMIT R. JUDD, SR., was called as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. DI LEO:

142 Q. Please speak up. State your full name.

A. Kermit R. Judd, Sr.

Q. Are you related to Bob Judd?

A. My son.

Q. Mr. Judd, did you have occasion to see Robert on or about March 24, 1950?

A. Yes, sir, he was at my house in the evening of the 24th and had lunch with me.

Q. What time did he come to your home on March 24?

A. Well, I was asleep when he came there.

Q. You were asleep?

A. Yes, sir.

Q. What time did you awaken, sir?

A. I guess quarter of three.

Q. Was that in the afternoon?

A. Yes, sir.

Q. What time did you go to work that day?

A. I left home about quarter after three.

Q. Was Bob there when you awakened, when you left for work?

A. Yes, sir.

Q. Who else was with Bob?

A. His wife.

Q. That was in the afternoon?

A. Yes.

143 Q. Did Bob and his wife leave with you?

A. Yes, sir.

Q. Where did you take them to?

A. I taken them to 12th and New York Avenue, at the bus terminal.

Q. You left them there?

A. Yes.

Q. Did Bob talk to you about a car that he had at his brother's?

A. Yes, sir.

Q. Did you ever see that car out there at his brother's?

A. I have saw it since.

Q. Is it still there?

A. Yes, sir.

Q. What condition is it in? Is it runnable?

A. No, sir.

Q. Did you have any discussion about the car that afternoon, March 24?

A. Yes, sir. Bob came in there——

By THE COURT:

Q. You are not asked what the conversation was; you are simply asked if there was a conversation.

A. He came there to borrow a hundred dollars from me to fix the car up.

By Mr. DI LEO:

144 Q. Did anything further take place then?

A. No.

Q. After you two left the house, was that the last you saw of Bob on March 24?

A. That is right.

Q. That was around what time?

A. Around 3:15 in the evening.

Q. Do you recall offhand how he was dressed on that occasion?

A. Well, he had a blue suit on, as far as I remember. I believe he had a small check in it.

Q. Small spots in it?

A. Yes, sir.

Q. You didn't see him any more until when?

A. This morning.

Q. Until this morning?

A. Yes, sir.

Q. He has been locked up all this time?

A. Yes, sir.

Q. Did you visit him?

A. No.

Q. You know that he was?

A. Yes, sir.

Mr. DI LEO: I believe that is all.

* * * * *

146 Mr. BACON: Your Honor, may we now recall Mr. Thompson?

THE COURT: Very well.

I may state to the jury that this is part of the Government's case again. This particular witness who is going to testify now is not testifying on behalf of the defendants but on behalf of the United States.

Thereupon,

CURTIS M. THOMPSON, was recalled as a witness and, having been previously duly sworn, testified further as follows:

Direct examination

By Mr. BACON:

Q. Mr. Thompson, you testified you had a piece of cardboard with a footprint impression on it, which is repre-

sented by Government Exhibit 5. After you had finished your examination and had taken pictures, and so forth, what did you do with that impression—that piece of cardboard?

A. Well, I wrapped it up in a piece of cellophane paper. That is the usual procedure. As to the exact disposition of it, I don't know if I recall exactly how we—how it was returned.

147 Q. Did you yourself return it?

A. I don't believe so.

Q. Do you remember whether you turned it over to a member of the police department or of the FBI?

A. If my recollection is correct, I gave the evidence to another member of the FBI, and he returned it to the police.

Mr. BACON: I have no further questions of this witness, Your Honor.

Mr. DI LEO: I have no questions, Your Honor.

CONSTANCE JUDD, was called as a witness and, being first duly sworn, testified as follows:

Direct examination

By Mr. DI LEO:

Q. Mrs. Judd, keep your voice up. Will you state your full name, please?

A. Constance Elizabeth Judd.

Q. Are you related to Robert Judd?

148 A. Wife.

Q. Where were you and your husband living on or about March 23, 1950?

A. 906 Maryland Avenue, Northeast.

Q. Did you see your husband on March 23, 1950?

A. Yes.

Q. Did you see him on March 23?

A. Yes.

Q. What time of the day did you see him?

A. All day until about 4 o'clock—4 or a little after.

Q. Your husband left at 4 o'clock?

A. Somewhere around 4 or a little after.

Q. Do you recall how your husband was dressed on that occasion?

A. Yes. He had a blue suit on, tan shoes, and a tan shirt.

Q. Did he tell you where he was going?

A. Told me he was going out to his brother's house.

Q. What was the condition of the weather on that occasion?

A. It was raining.

Q. Did you see your husband any more that evening?

A. No.

149 Q. What time of day on the 24th did you see your husband?

A. Between 8:30 and 9 o'clock.

Q. Where did you see your husband?

A. He came home.

Q. How was he dressed on that occasion?

A. The same way.

Q. The same way he left on the day before?

A. That is right.

9 Q. Did your husband leave the house at any time from 9 o'clock that morning until later that evening?

A. No. We both left about 12 or 11.

Q. Where did you and your husband go?

A. Went and had breakfast and then went up to his father's.

Q. That was around 12?

A. Yes.

Q. How long did you remain at his father's?

A. Till about 3:30; something like that.

Q. Did you see his father?

A. Yes, we ate dinner with his father.

Q. What time did you have dinner?

A. He was going to work. I think it was around 4 o'clock, and his wife fixed dinner, and we ate, and then he took us downtown.

Q. That was in the afternoon?

150 A. In the afternoon.

Q. When he drove you and Bob into town, how long did you remain in town together?

A. About 15 or 20 minutes, while we were waiting for the bus to come in.

Q. Did you continue to remain in each other's company until later that night?

A. Yes.

Q. Did you part that night? Did Bob leave you, or did you leave Bob at any time during that night of the 24th.

A. Not till I went home.

Q. That is what I mean.

A. No.

Q. Did you go to a movie that night?

A. Yes.

Q. What was the name of it?

A. I don't know the name, but it was down on Ninth Street somewhere.

Q. What time did you come out of the movies?

A. I think it was around 9 or 9:30.

Q. Then, did Bob leave?

A. Yes. I got in a cab and went home.

Q. When was the next time you saw Bob or heard from Bob?

A. When the police brought him in over to the house.

151 Q. Let us get the times set on this. Bob left you about 9:30 on what date? What night?

A. Friday night.

Q. About 9:30 or 9 o'clock?

A. I don't know exactly what time.

Q. You know it was about that time?

A. It was about that time.

Q. Friday night?

A. Friday night.

Q. That was March 24?

A. Yes.

Q. When was the next time you saw Bob?

A. I think it was after 2 o'clock. I know it was after 2.

Q. Two o'clock the following morning?

A. Morning, yes, sir.

Q. That was the 25th of March?

A. 25th, yes.

Q. Will you state to His Honor and the ladies and gentlemen of the jury under just what conditions you saw your husband less than six hours later, from the time you left him?

A. Four policemen walked in with him in the middle, and he had on handcuffs.

Q. On both hands?

A. Both hands.

152 Q. Did he come to your room?

A. Yes, came to my room and knocked on the door.

Q. Did they say anything before they entered the room?

A. No; they walked in—pushed the door open, walked in, pushed me aside. One of them showed me a police badge. At least, one of them pulled open and showed a police badge. At least, that is what they said it was.

Q. Did you say anything to the police?

A. I asked them what was wrong, and they didn't say anything. They just said. "Police business," and then they started searching the room. I told them they had no right to, and every time I opened my mouth, they told me to be quiet.

Q. Did Bob, your husband, say anything?

A. He told them they had no right to search his room.

Q. What did they say to that?

A. "Shut up."

Q. Did they permit you to talk to your husband?

A. No.

Q. These shoes: Did you see these shoes in your room?

A. Yes.

Q. Whom did these shoes originally belong to?

A. Originally belonged to Kermit, Bob's brother.

Q. Did you ever see Bob with these on?

A. No.

Q. What size does Bob wear?

153 A. 9 or 9½.

Q. What size sock does he take?

A. 11½.

Q. Do you know what size these shoes are?

A. I don't know exactly. His brother said they were 8's.

Q. How long had Bob had them in your room? How long were they in there, approximately?

A. Approximately, I would say, a week or ten days; something like that.

Q. What was he supposed to do with these shoes, if anything?

A. Give them to his younger brother.

Q. Is that Glen or Carroll?

A. Carroll.

Q. Is that the youngest—that is here today?

A. That is right.

Q. Did the police continue to search after you told them not to?

A. Yes.

Q. Did they take any money from your person?

A. Ten dollars.

Q. Did they take any other money belonging to you in the room?

A. Yes, they took \$95 out of a drawer.

154 Q. That belonged to whom?

A. To me.

Q. Did you tell them it was your money?

A. No; they wouldn't let me open my mouth.

Mr. DI LEO: I think that is all.

Cross-examination

By Mr. BACON:

Q. Your husband left you about 4 p. m. on March 23; is that correct?

A. That is right.

Q. You didn't see him again until about 8:30 or 9 o'clock in the morning of March 24; is that correct?

A. That is right.

* * * * *

158 By Mr. BACON:

Q. The money that was taken by the police that night was returned to you, was it not?

A. Yes.

Mr. BACON: No further questions.

Mr. DI LEO: Just a question.

Redirect Examination

By Mr. DI LEO:

Q. That was returned, however, about a month or two later, wasn't it? It was returned two weeks ago?

A. That is all.

Q. Two weeks ago was just before the latter part of May, and it was taken from you on March 24?

A. That is right.

159 THE COURT: Mr. Di Leo, your client is not going to testify?

Mr. DI LEO: He is not.

* * * * *

170 (At 3:49 p. m. an adjournment was taken until Monday, June 12, 1950, at 10:00 a. m.)

* * * * *

218 CHARGE TO THE JURY

THE COURT: (Bailey, J.): Members of the jury: The United States charges these two defendants in the first

count of the indictment with entering the building of the Standard Transfer & Storage Company with the intent to steal.

The second count charges them with grand larceny—that is, the actual theft of property exceeding the sum of \$50 in value.

The Government has introduced evidence to show that someone did break into this building and that someone did steal certain property set forth in the second count of the indictment. If you so find, then the question for you to determine is, Were these defendants the ones who did that? Did they break in or enter this building for the purpose of stealing, and did they actually steal this property?

There has been evidence tending to show that certain of this property was found in the possession of the defendant White. Now, where property has been stolen and is found in the possession of one, and that possession has not been satisfactorily accounted for, then you may infer from that possession not accounted for that the person in whose possession the property was found was the one who stole the property; and if this property was stolen from this building, that he stole that property.

As to the defendant Judd, the Government has introduced evidence as to certain footprints or shoe
219 prints found upon a box top in this building after this property had been stolen, and that these marks upon that box corresponded with marks made by the shoe found in the possession of the defendant Judd. Therefore, the Government contends that Judd must have been present at the time of this theft and must have participated in it. The defendant White has denied this and denied possession of this property.

Those are the issues for you to determine: Whether or not this property had been stolen and was found in possession of White; whether White has satisfactorily accounted for it; and if it was in his possession and not satisfactorily accounted for, then, as I say, you may infer that he unlawfully entered this building for the purpose of stealing and actually stole the property.

If you find from the evidence as to Judd that he participated in it, he would be equally guilty.

Now, those are the facts for you, and for you alone, to decide. You are bound by my instructions as to the law, but any statement I may make as to the facts in this case is not binding upon you in any way.

You are the exclusive judges of the credibility of the witnesses. You may take into consideration the appearance of the witness on the stand, his demeanor while testifying, whether a witness is frank or evasive in testifying, 220 the interest a witness may have in the result, whether as a defendant or by reason of family relationship or employment—Federal employment—or any fact developed in the testimony which might tend to bias or color the testimony of a witness.

If any witness has willfully testified falsely as to any fact as to which that witness could not reasonably be mistaken, you may disregard the testimony of that witness in whole or in part, as you deem fit.

The burden is upon the Government to prove the guilt of the defendants beyond a reasonable doubt. It is not a question of suspicion or probability, but whether the Government has proved their guilt beyond a reasonable doubt; that is, such a doubt as would cause one of you to pause and hesitate before taking some important step in life that you were not compelled to take.

The defendant White has testified in this case, and there is evidence that he has committed other crimes before the time charged in this indictment. Now, you cannot consider the fact that he may have been guilty of other crimes as any evidence that he committed this particular crime or as tending to show that, but you may consider it in determining what weight you shall give to his testimony.

The defendant Judd has not testified. He has a right to testify or not, as he may decide. You cannot consider his failure to testify as any admission of guilt or as tending 221 ing to prove his guilt.

As I said before, the burden is upon the Government to prove the guilt of the defendants beyond a reasonable doubt.

Do counsel have any further requests for instructions?

Mr. BACON: The Government is content.

Mr. DI LEO: The defendant Judd is content, Your Honor.

Mr. HARRIS: Content.

(At 11:31 a. m. the jury retired to consider of its verdict.)

(At 3:39 p. m. the jury returned to the court room and rendered its verdict as follows:)

Verdict of the Jury.

THE DEPUTY CLERK: Madam Foreman, has the jury agreed upon a verdict?

THE FOREMAN OF THE JURY: We have.

THE DEPUTY CLERK: On Count 1 of the indictment, what say you as to Ernest N. White?

THE FOREMAN OF THE JURY: Guilty.

THE DEPUTY CLERK: On Count 1 of the indictment, what say you as to Robert J. Judd?

222 THE FOREMAN OF THE JURY: Guilty.

THE DEPUTY CLERK: On Count 2 of the indictment, what say you as to Ernest N. White?

THE FOREMAN OF THE JURY: Guilty.

THE DEPUTY CLERK: On Count 2 of the indictment, what say you as to Robert J. Judd?

THE FOREMAN OF THE JURY: Guilty.

* * * * *

226

PROCEEDINGS

Mr. DI LEO: May it please the Court: We are asking the Court at this time to hear us on a motion for a new trial. The first ground set forth is that the Court erred in denying defendant's motion for acquittal, made at the conclusion of the evidence and after the conclusion of the Government's case.

If the Court please, with respect to the evidence as submitted, the Court well knows all the evidence and the facts adduced at the trial. The point that I wish to stress before the Court is on the strength of the Rabinowitz case, in the Supreme Court of the United States. Here was a man who was only taken into custody, without provocation or possible evidence of any crime. This man was taken to the jail house. They had no evidence; and further, if it please the Court, they took him to the Metropolitan Police Department, and there they merely held him on an open charge of investigation. That was around 10 o'clock in the evening.

At two o'clock in the morning they went to his home. They took the keys from the Property Clerk, and Your Honor well recalls the testimony of Officer Friel, or Sergeant Friel, who said to Your Honor that this man—and there was no evidence to the contrary—no evidence to the contrary—was handcuffed to four officers. Sergeant Friel

227 stated to Your Honor that he took the keys and handed them to Sergeant Talbot and had them in his possession even after he entered the premises.

Against the defendant's objection, they entered his home, and then they entered the room of the defendant and his wife.

Your Honor will recall the wife's testimony. She stated to Your Honor that when the door was slightly open, they pushed her back with such force as to knock her backward. She objected to it, and her husband objected to their taking clothing out of place. In addition to personal property, they took a pair of shoes that was used in evidence, all over the objection of the defendant and his wife.

There was no search warrant, there was no warrant of arrest, there was no probable cause to justify a search; it was purely an exploratory matter. They went in there not knowing what they were actually looking for. They took everything, including cameras, glasses, money, trousers, suits, and other evidence, this other material belonging to the defendant.

Notwithstanding that, Your Honor recalls the testimony, further, that they came back to headquarters and did not book the defendant until the next day.

Sergeant Friel told Your Honor that they had a hearing before the Commissioner the following morning and that at that time there was this foot print that was found
228 on the carton cover.

On cross-examination it was brought out that he did not introduce this and that the Commissioner's hearing was not held until three weeks later. Your Honor said something to the Assistant District Attorney at the time to the effect that he would have to connect up the carton cover, so he brought back Mr. Thompson, the FBI man, but that did not connect it up with this particular print. In other words, allowing them to go into the effect of the photographs and enlargements, everything went into evidence over and above the objections of myself on behalf of the defendant Judd.

Your Honor, on that ground alone we say that there was an illegal search and an illegal arrest, without the warrant that is required in the ordinary case of arrest or search.

THE COURT: Was not that question passed on first by Judge Holtzoff?

Mr. DI LEO: Judge Holtzoff heard only the skeleton of it, Your Honor.

THE COURT: I have had it filled out, and I am of the same opinion as Judge Holtzoff was on the skeleton.

Mr. DI LEO: In a similar motion filed by counsel for White as to the search made of his premises, it is a matter of record that when they entered White's premises they took, in his place, articles of clothing, and they returned them on

almost the same set of conditions in which they took
 229 clothing from his room. Judge Holtzoff ordered the
 return of those articles of clothing and allowed that
 evidence to be suppressed, in the same case and on the same
 set of facts.

I cannot see, Your Honor, where the difference is in going
 into White's house or White's room without a search war-
 rant and allowing that evidence to be suppressed. That is
 a matter of record, and this is identical. To my mind, this is
 going into my client's house without a search warrant and
 there allowing the motion not to be suppressed, and in the
 other case allowing the suppression of evidence. I cannot
 distinguish between the two cases.

THE COURT: I will hear from Mr Harris. I do not mean
 to stop you if you have any other point.

Mr. DI LEO: The other point Your Honor is well ac-
 quainted with. Your Honor listened to all the facts during
 the trial, and I know Your Honor——

THE COURT: I am satisfied of the guilt of the defendant,
 as far as that goes, from the evidence. Both the jurors and
 I were satisfied.

Mr. DI LEO: Your Honor, I feel this way: I did not solicit
 information from the jurors. I do not say they were totally
 satisfied. I say this: that what had a great deal of
 weight——

THE COURT: I would not listen to anything the jurors
 said after the verdict.

230 Mr. DI LEO: All I was going to say was this: The
 fact that certain——

THE COURT: Their verdict was guilty beyond a reasonable
 doubt. I thought so too.

* * * * *

232 THE COURT: I overrule both motions.

Mr. DI LEO: Your Honor, may I state just one
 more word, please?

THE COURT: All right.

Mr. DI LEO: I forgot to mention to the Court that one
 of my other grounds—not a ground, but a statement—is
 to the effect that during the trial Mr. Bacon placed a gun
 on the table, which I noticed the jurors looking at. It was
 never used in evidence at any time.

In addition to that, if the Court please, Sergeant
 233 Sisson volunteered, long before the defendant White
 took the stand, and indicated to the jury and to the

Court, that the reason why he arrested him—and this also reflects on my client—was that he had a record and was a police character. That in itself is indicative, may it please the Court, to the jurors that the man had a police record. That was volunteered on direct examination.

The COURT: I overrule the motion.

Mr. DI LEO: If Your Honor please, one more point. Mr. Bacon agreed with me—he is not here this morning; there is another man in the case—he agreed that there was a suit of clothes that had no bearing whatsoever on this case—that the defendant wore at the time of his arrest, that had no bearing whatsoever on the case—and a pair of trousers—

The COURT: Get him to write his consent on that.

* * * * *

246 Filed in Open Court May 8, 1950. Harry M. Hull,
Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA, HOLDING A CRIMINAL TERM, APRIL TERM, 1950

Criminal No. 699-50

Grand Jury No. 592-50

Housebreaking and Larceny

(22-1801, 2201, 2202, D. C. Code)

THE UNITED STATES OF AMERICA

vs.

ERNEST N. WHITE

ROBERT J. JUDD

The Grand Jury charges:

On or about March 24, 1950, within the District of Columbia, Ernest N. White and Robert J. Judd entered the building of Standard Transfer & Storage, Inc., a body corporate, with intent to steal property of another.

SECOND COUNT:

On or about March 24, 1950, within the District of Columbia, Ernest N. White and Robert J. Judd stole the property of Standard Transfer & Storage, Inc., a body corporate, and William B. Doster of the value of about

\$2622.00, consisting of the following: sixteen hundred twenty-two dollars in money, property of Standard Transfer & Storage, Inc., a body corporate; and one thousand dollars in travelers checks, property of William B. Doster.

GEORGE MORRIS FAY,
*Attorney of the United States in
and for the District of Columbia.*

A True Bill. Charles E. Steidil, Foreman.

247 Filed May 12, 1950. Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Criminal No. 699-50

Charge Housebreaking and Larceny

UNITED STATES

vs.

ERNEST N. WHITE

ROBERT J. JUDD

Defendants

PLEA OF DEFENDANT

On this 12th day of May, 1950, the defendants Ernest N. White and Robert J. Judd each, appearing in proper person and by their attorney Joseph B. Di Leo each, being arraigned in open Court upon the indictment, the substance of the charge being stated to each, pleads not guilty thereto.

Each defendant is remanded to the District Jail.

By direction of

BURNITA S. MATTHEWS,
Presiding Judge, Criminal Court #4.

HARRY M. HULL,
Clerk,

By OSCAR ALTSHULER,
Deputy Clerk.

Present:

_____,
United States Attorney
By HAROLD BACON,
Assistant United States Attorney
EDWARD L. BETTIS,
Official Reporter.

248 Filed May 17, 1950. Harry M. Hull, Clerk
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

(Holding a Criminal Term)

Criminal No. 699-50

Grand Jury No. 592-50

Housebreaking and Larceny
(22-1801, 2201, 2202, D. C. Code)

THE UNITED STATES OF AMERICA

VS.

ROBERT J. JUDD

MOTION FOR THE RETURN OF SEIZED PROPERTY AND THE
SUPPRESSION OF EVIDENCE

Comes now the defendant, Robert J. Judd, by his attorney of record, Joseph d. Di Leo, and hereby moves this Court, to direct that certain property which is hereafter more particularly described, of which he is the owner, and which was on there or about March 25, 1950, from his person and home, unlawfully seized and taken from him by members of the Metropolitan Police Department, be returned to him and that it be suppressed as evidence. A schedule of the property is annexed hereto.

All of which property was seized against the will of the petitioner without a valid search warrant or warrant of arrest and prior to arrest and formal arrest of your petitioner without a warrant and after an exploratory search, in clear violation of the rights of said petitioner under the provisions of the Fourth (4th) and Fifth (5th) Amendments to the Constitution.

WHEREFORE, the petitioner request that the property seized be returned to him and same be suppressed as evidence.

JOSEPH D. DI LEO

Attorney for Defendant

Denrike Building

Washington, D. C.

To: United States Attorney,
District Attorney's Office,
Washington, D. C.

Please take notice that this motion will be called to the attention of the Court on May —, 1950, at 10 A.M. or as soon thereafter as the Court may allow.

Acknowledged Service:

JOSEPH D. DI LEO.

— — —.

249 Filed May 17, 1950. Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

(Holding a Criminal Term)

Criminal No. 699-50.

Grand Jury No. 592-50.

Housebreaking and Larceny.

(22-1801, 2201, 2202, D. C. Code.)

THE UNITED STATES OF AMERICA

vs.

ROBERT J. JUDD

AFFIDAVIT IN SUPPORT OF MOTION

DISTRICT OF COLUMBIA, ss:

Robert J. Judd, after first being duly sworn on oath according to law deposes and says, that on to-wit, March 25, 1950, at about 2 A.M., members of the Metropolitan Police Department caused me to be taken to my home at 906 Maryland Ave., N. E., Washington, District of Columbia. The police officers took a set of keys from my personal belongings at #1 precinct without my permission and used same to enter my home over my objections. The police after entering my home went to the room where my wife was at the time and upon my wife opening the door slightly the police forced their way into the room and began searching the room. They did not have a search warrant, nor did my wife nor I give them permission to search the room. The police took a pair of trousers, a pair of shoes and \$156.00 in bills of which \$95.00 was my wife's person funds, she had saved while she was employed. I was not under formal arrest nor was I charged with any offense at this time as the charge was placed against me later on.

ROBERT J. JUDD.

Subscribed and sworn to this 17th day of May, 1950.

[SEAL.]

GEO. E. STOKES,
Notary Public, D. C.

250 Filed May 17, 1950. Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

(Holding a Criminal Term)

Criminal No. 699-50.

Grand Jury No. 592-50.

Housebreaking and Larceny.

(22-1801, 2201, 2202, D. C. Code.)

THE UNITED STATES OF AMERICA

vs.

ERNEST N. WHITE, ROBERT J. JUDD

AFFIDAVIT IN SUPPORT OF MOTION

DISTRICT OF COLUMBIA, ss:

Constance E. Judd, after first being duly sworn on oath according to law deposes and says, that on to-wit March 25, 1950, at about 2 A.M., members of the Metropolitan Police Department came to my home at 906 Maryland Ave. N. E., Washington, District of Columbia. The Police Officers opened the front door of the house with keys belonging to my husband, without consent of my husband Robert J. Judd. The police then knocked at my door which I partly opened, pushing the door aside and entered the room. The police did not show me a search warrant and began to search my room without my permission, taking a camera, sun glasses, a pair of green trousers, a pair of shoes and \$156.00 in bills. The \$156.00 belonged to my husband and me, of which \$95.00 had been saved by me over a period of months while I was employed. The police also took \$10.00 out of my billfold at that time. That neither I or my husband gave the police officers permission to take the money and the personal items out of our room. I told the police later that the \$95.00 belonged to me; in addition to this the police returned the camera and sun glasses and billfold and keys, but refused to give me my own \$95.00.

CONSTANCE E. JUDD.

Subscribed and sworn to this 15th day of May, 1950.

ROBERT _____
Notary Public, D. C.

* * * * *

252 Filed June 12, 1950. Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Criminal No. 699-50.

Charge: Housebreaking and Larceny.

UNITED STATES

vs.

ERNEST N. WHITE, ROBERT J. JUDD, Defendants

On this 12th day of June, 1950, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respited Friday, June 9, 1950; whereupon the said jury upon their oath say that each defendant is guilty as indicted.

The defendants are remanded to the District Jail, and the case is referred to the Probation Officer.

By direction of

JENNINGS BAILEY,
Presiding Judge, Criminal Court #2.

HARRY M. HULL,
Clerk,

By C. H. MILSTEAD,
Deputy Clerk.

Present:

_____,
United States Attorney.

By HAROLD BACON,
Assistant United States Attorney.

F. J. ATTIG,
Official Reporter.

253 Filed Jun. 17, 1950. Harry M. Hull, Clerk
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Holding a Criminal Term

Criminal No. 699-50

UNITED STATES OF AMERICA,

vs.

ROBERT J. JUDD, Defendant

MOTION FOR A NEW TRIAL

The defendant, Robert J. Judd, moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence and after the conclusion of the Government's case.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. The Court erred in admitting the testimony of the witness, Curtis E. Thompson, F. B. I. Agent, and the exhibits produced by him.

5. The defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances: That Sergeant Sisson stated to the Jury on direct examination that the defendant White had a "record and was a known police character" or words to that effect; that a gun was displayed on the table in front of the jury that was not used in evidence; that the jury was influenced by the newspapers articles concerning the defendant's brother over the weekend of June 11th, 1950; and for such other and further reasons which will be called to the attention of the Court upon hearing of the motion.

JOSEPH D. DI LEO,
Attorney for Robert J. Judd,
Denrike Building.
Washington, D. C.

E. L. Carey 6/17/50.

To: U. S. Attorney,
U. S. Attorneys Office,
Washington, D. C.

This motion will be called to the attention of the Court upon such day as may be set for hearing by the proper parties duly authorized to do so, or such time as the Court may grant this motion to be heard.

JOSEPH D. DI LEO.

254 Filed June 23, 1950. Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Criminal No. 699-50

Charge: Housebreaking and Larceny.

UNITED STATES

vs.

1. ERNEST N. WHITE, 2. ROBERT J. JUDD, Defendants

On this 23rd day of June, 1950, came the attorney of the United States; each defendant in proper person and by their attorneys, Philip A. W. Harris and Joseph D. Di Leo; whereupon the defendants' motions coming on to be heard, after argument by counsel, it is ordered by the Court that the motions of each defendant for a new trial be overruled, and that the motion of the defendant Robert J. Judd for the return of seized property is granted.

By direction of

JENNINGS BAILEY,
Presiding Judge Criminal Court #2,
HARRY M. HULL,
Clerk,

By C. H. MILSTEAD,
Deputy Clerk.

Present:

_____,
United States Attorney,
By ROBERT M. SCOTT,
Assistant United States Attorney.
F. J. ATTIG,
Official Reporter.

255 Filed July 10, 1950. Harry M. Hull, Clerk

JUDGMENT AND COMMITMENT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DIVISION

Criminal No. 699-50

UNITED STATES OF AMERICA

v.

ROBERT J. JUDD

On this 7th day of July, 1950 came the attorney for the government and the defendant appeared in person and¹ by counsel, Joseph D. Di Leo, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of² not guilty and a verdict of guilty of the offense of Housebreaking and Larceny as charged³ and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of⁴ Three (3) years to Nine (9) years on count one; Three (3) years to Nine (9) years on count two; said sentence by the counts to run concurrently, and concurrently with the sentence imposed in criminal case No. 76438.

¹ Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

² Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

³ Insert "in count (s) number ——" if required.

⁴ Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy served as the commitment of the defendant.

JENNINGS BAILEY,
United States District Judge.

256 Filed July 7, 1950. Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Criminal No. 699-50

UNITED STATES OF AMERICA

VS.

ROBERT J. JUDD

NOTICE OF APPEAL

Name and address of appellant: Robert J. Judd, 906 Maryland Ave., N. E., Washington, D. C.

Name and address of appellant's attorney: Joseph D. Di Leo, 1010 Vermont Ave., N. W., Washington, D. C.

Offense: Housebreaking and Grand Larceny.

Concise statement of judgment or order, giving date, and any sentence: On July 7, 1950—Judgment of the Court and sentenced as follows:

Housebreaking—Sentence from 3 to 9 years.

Grand Larceny—Sentence from 3 to 9 years.

Revoked probation—Sentence 2 to 6 years. All sentences to run concurrently.

Name of institution where now confined, if not on bail: District Jail, Washington, D. C.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

ROBERT J. JUDD,
Appellant;
JOSEPH D. DI LEO,
Attorney for Appellant.

July 7, 1950.

* * * * *

The Deputy Clerk. In re motion of Robert J. Judd.

MOTION TO SUPPRESS

MR. DI LEO: In this particular motion, if the Court please, I would like to make a request to take testimony of the defendant and also of his wife.

THE COURT: We will see just what the issues are. You state what your contentions are.

MR. DI LEO: My contentions, if it please the Court, with respect to this motion, are these:

That on March 24, in the afternoon, the late afternoon of March 24, or the early part of the evening, Mr. Judd was visiting premises on 8th Street. I believe it is 908 8th Street. As he arrived there he was taken into custody, taken to Headquarters, and there he was held. No charge, to my knowledge, or to his knowledge, at the time of the arrest. He was taken from there bodily and put in No. 1 Precinct. After interrogating him, they asked numerous questions, and he denied emphatically.

THE COURT: Just confine your statement to the motion.

MR. DI LEO: Yes, sir.

He was there at No. 1 Precinct from that late afternoon or early part of the evening until the early part of the
265 morning of March 25, 1950, and he was held there until 2 o'clock in the morning. At that time, if it please the Court, over the objection of my client, he was taken out of the——

May I interrupt at this time, your Honor?

If the police officers are here in the courtroom, may they be excused while I am arguing this motion, sir?

THE DEPUTY CLERK: All witnesses in the case of Robert J. Judd will please retire to the witness room until called. All witnesses.

(The witnesses retired from the courtroom.)

THE COURT: Proceed.

MR. DI LEO: At that time, if it please the Court, after holding him until late that afternoon of March 24, the early part of the evening, they took him at 2 or 2:30 in the morning of the 25th of March, they took him, if it please the Court, over his objection, to his home. They took the keys which were his property from No. 1 Precinct property clerk at the Municipal Building across the street. They took him with handcuffs, if it please the Court——

THE COURT: I don't care about that. Don't make a jury speech.

MR. DI LEO: I am not getting dramatic.

THE COURT: I don't care whether they took him with handcuffs or without handcuffs.

MR. DI LEO: I am trying to show they took him
266 against his will.

THE COURT: That doesn't show it was against his will. Sometimes handcuffs are used in order to prevent a person from escaping.

MR. DI LEO: There is no charge yet placed against him, if it please the Court.

Anyway, they took him to his home, your Honor, over on Maryland Avenue, Northeast. They opened the door with the key—the police officers, with his keys, over his objection—they went to his room, where his wife was in bed, knocked at the door. She opened it partially. They pushed the door in, and three or four officers rushed by her and immediately, without any knowledge and without her consent, began to tear up the beds, that is, throw up the mattress—

THE COURT: What did they seize and what do you seek to suppress?

MR. DI LEO: They seized a pair of trousers and a pair of shoes, your Honor.

THE COURT: And you want to suppress that as evidence?

MR. DI LEO: That is correct, sir.

THE COURT: Very well.

What does the Government say?

MR. BACON: The Government states, your Honor, that at approximately 2 a. m., while this man was in custody, booked on a charge of investigation, that they asked him
if he had a pair of shoes, another pair of shoes.
267 He stated that he did, and that they were in his room.

They said, "Well, can we go up there and look at them?"

He said, "You can," and went with them, giving his permission.

They opened the outer door with his key that they had gotten from the police property clerk, which is the outer door of a rooming house. They went to the defendant's room, where they knocked on the door. The wife answered the door. They told her what they wanted, and she admitted them. They did find the pair of shoes and the pants that they were seeking.

THE COURT: What about the trousers?

You mentioned the shoes. What about the trousers?

MR. BACON: I don't know, your Honor, if there was any prior conversation at the time they got to the room about the trousers.

THE COURT: Isn't this the issue in the case? Whether the search and seizure were with the defendant's consent? Isn't that the only issue to be determined?

MR. BACON: Yes.

THE COURT: Because, obviously, this type of search and seizure is illegal, it not being incidental to the arrest, unless there is a search warrant or unless the defendant consents.

MR. BACON: The Government agrees to that, your Honor.

268 THE COURT: Very well. We will try the issue of consent.

I think the burden is on the Government, and you might call your witnesses first.

MR. BACON: I will call Sergeant Friel.

Thereupon

WILLIAM W. FRIEL was called as a witness for and on behalf of the United States and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By MR. BACON:

Q. Your full name and assignment, please, Officer?

A. William W. Friel, Detective Sergeant, Police Headquarters.

Q. Sergeant Friel, did you accompany the defendant in this case, Judd, to his place of abode on the 25th day of March, 1950?

A. I did.

Q. What time did you accompany him there?

A. It was 1 or a little after in the morning.

Q. And from where did you leave?

A. Police Headquarters, the Safe Squad.

Q. Did you have any conversation with him prior to going to his residence?

A. I did.

269 Q. Would you tell us that conversation?

A. I told him we were looking for a pair of shoes, and asked him if he had any extra shoes at home, and he

stated he did. I asked him if he minded us going over to his room and taking a look, and he said no.

We went over there.

Q. And who went with you?

A. Sergeant Lubore and Sergeant Talbott.

Q. And did the defendant accompany you?

A. Yes, he did.

Q. And did you go into his place of abode?

A. We did.

Q. And how did you gain admittance?

A. We had the key to his room.

Q. Where did you get the key?

A. We had that at Headquarters and we finally took it, and with us, and handed it to him at the front door.

Q. Who opened the lock, or turned the lock to open the front door?

A. The defendant Judd.

Q. And what did you do after you got in the building?

A. After we got in the building, it was a rooming house, and he lived in the front room on the first floor, and we rapped at the door and his wife asked who was there.

We said, "The police."

270 She said, "Just a moment."

She later opened the door and said, "My God, what's the trouble?"

We told her her husband was in a little trouble, and she said, "Well, come in," and we went in the room.

Q. What did you do after you got in the room?

A. I told her we were looking for a pair of shoes and just as I walked in the room, I spied a pair of shoes up on top of a clothes cabinet, and those were the shoes that I was looking for.

Q. Did you take the shoes?

A. Yes, we did.

Q. Did you take a pair of pants?

A. Took a pair of pants too.

Q. Where did you get the pair of pants?

A. Out of the closet.

Q. And for what reason?

A. Well, we took samples of insulation from the safe, and also chips of paint off the safe, and we figured that they may be in those clothes.

Q. Did at any time these people object to your entrance into the room?

A. They did not.

- Q. Did at any time these people object to your searching the room?
 271 A. They did not.

Mr. BACON: Your witness.

Cross-examination.

- 272 Q. You stated that you had the keys. Was it you that had the keys?
 A. No, they were in the cell block downstairs.
 Q. Who got the keys from the cell block?
 A. Sergeant Talbott and all of us were together.
 Q. But who got the keys?
 A. Sergeant Talbott.
 Q. Did he have the keys in his possession?
 A. At that time, yes, sir.
 Q. Did he have them in his possession when you got to the front door of Judd's home, 908 Maryland Avenue?
 A. That is right.
 Q. Talbott had them in his possession?
 A. That is right.
 Q. And did you take Judd along on that occasion?
 A. Yes, sir.
 Q. Was he under arrest, or were any charges placed against him then?
 A. He was held under investigation.
 273 Q. And then you went to his home?
 A. That is right, sir.
 Q. Who gave Judd the keys to go in the house?
 A. Talbott.
 Q. Talbott did?
 A. Yes.
 Q. How many keys were there, do you know?
 A. I don't know.
 Q. And Judd opened the door?
 A. That is right, sir.
 Q. And you all went in?
 A. That is right.

274 By Mr. DI LEO:

- Q. Did he give you consent to search that room?
 A. He didn't give us actual consent to search it. He gave us consent to go in there. I told him I was looking for a pair of shoes and he said it was all right to go over there, and I found what I looked for.

Q. He said it was all right to go over there?

A. That is right.

Q. And you took him with you to go over there?

A. That is right.

Q. Did Mrs. Judd give you permission to search the room?

A. No.

THE COURT: Now, I think the defendant was the householder and not his wife. The law still is that the husband is the master of the house and not the wife. So he did not need the wife's permission. He needed the defendant's permission.

By Mr. DI LEO:

Q. Officer, in respect to your search of the room, you got a pair of shoes and a pair of trousers?

A. That is right.

Q. Did you take anything else at that time?

A. I didn't; no, sir.

Q. The rest of them did, didn't they?

A. Excuse me, I did, too. \$156 was turned over to me.

The COURT: Now, we are not going into that.

Mr. DI LEO: No.

* * * * *

277 EDWIN F. TALBOTT was called as a witness for and on behalf of the United States and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. BACON:

Q. Give us your full name and assignment, please, Officer.

A. Edwin F. Talbott, Detective Sergeant attached to the General Assignment Squad of the Detective Bureau, Metropolitan Police Department, Washington, D. C.

Q. Sergeant, on the 25th of March, 1950, did you accompany the defendant to his home at 906 Maryland Avenue, Northeast?

A. I did.

Q. And from where did you leave, what building?

A. From Police Headquarters, our office.

Q. Who went with you?

278 A. Detective Sergeants Friel, Lubore, Sisson, and myself,

Q. And did the defendant accompany you?

A. Judd accompanied us.

Q. Did he freely accompany you?

A. He did.

Q. Did you have any conversation with him prior to going to his home?

A. We did.

Q. Tell us that conversation, as best you remember it, please, Sergeant.

A. After Judd's arrest, we questioned him in regard to a housebreaking safe job. He denied any knowledge of it whatsoever. We questioned him about his background, the amount of money he had, where he was working.

He stated that he was unemployed and that he had in the neighborhood of \$150 or \$160 at home that he had won gambling.

We questioned him as to whether he had any tools that could be used in ripping safes.

The COURT: I do not think you need to go into those details for the purposes of this motion.

Mr. BACON: It is merely for the purpose of permission, Sergeant.

THE WITNESS: So, he said we would go out to his place and see, if we believed he had any of these things there.

So we went down to the cell block where his property was.

279 I got the key from there and, in the cruiser we went out to his house. On arrival at the front door the key was given to him. It is a rooming house. He opened the front door, the street door, with the key, and we went in. His room is the first floor front; knocked on the door, and a woman's voice answered asking who it was, and we stated it was the police, with her husband.

She said, "Just a minute." She had to put something on. Then after a very brief pause, the door was opened by her.

We identified ourselves as police officers. She saw her husband. The next thing she said, "Oh, my God, what has he done now?"

So we asked to come in, and she allowed us to come in.

We explained what we were there for.

Judd went directly to a bureau, I was alongside of him, and went in the bottom drawer of the bureau, and he got out approximately \$95 in cash.

I asked him about the rest of the money. He said that was in a wallet that his wife had, that he had given to her when they separated downtown earlier in the evening.

I asked her for the wallet and she surrendered the wallet to me. It was his wallet.

I asked her if any of that was her money, and she said yes, \$10 of it was her money.

The COURT: I don't think you need to go into the money.

280 There are only two articles here, as I understand it, that are involved; the shoes and the trousers.

By Mr. BACON:

Q. Were a pair of shoes seized from that room that evening?

A. Why, there was a pair of shoes seized there that evening?

Q. Did you seize them?

A. No, I didn't.

Q. Was a pair of trousers seized there that evening?

A. Yes.

Q. Did you seize those?

A. No, I did not.

Q. At any time did these people complain of your presence in the room?

A. No, they did not.

Q. At any time did these people complain of your search of the room?

A. They did not.

Q. Were you given permission to enter the room?

A. We were.

Q. By whom?

A. By Robert Judd himself, and then on our arrival there we were invited in by his wife.

Mr. BACON: No further questions, your Honor.

281 Cross-examination.

By Mr. DI LEO:

Q. Sergeant Talbott, did you tell Mr. Judd where you were taking him when you took him out of the building across the street?

A. Yes, we did.

Q. You did tell him?

A. We told him where we were taking him; yes.

Q. When did you tell him you were taking him to his home?

A. We had a conversation about his home and his property there, and he said we were free to go there and see, he had nothing to hide.

Q. When, I mean?

A. Oh, that was probably a matter of a half hour or three-quarters of an hour before we left.

Q. What time did you come on duty that night, Sergeant?

A. I had been working since 8:45 that morning.

Q. And Sergeant Friel, was he with you during that day?

A. No, he was not. He didn't come on duty until midnight.

Q. When you left Headquarters, just before you went to No. 1, that is downstairs in the basement, isn't it?

A. That is right.

Q. Was Mr. Judd with you then?

282 A. Yes, he was with me.

Q. Isn't it a fact, Sergeant Talbott, you never did tell Judd where you were taking him until you got in front of his house?

A. No. We had a conversation before and I told him where we were going, and he was well aware of the fact that we were going to his home. He said he had nothing to conceal or hide out there, and it was perfectly all right for us to go out there.

283 Q. Now, isn't it a fact that when you went to the door of Mr. Judd's room, the door being partially opened or slightly, that you pushed it in?

A. No. There was no need for rudeness on our part.

Q. Isn't it a fact that Mr. Judd objected to you going in his room?

A. No, he did not object.

Q. He didn't?

A. No, he did not.

Q. Didn't you or one of the officers tell him when he opened his mouth to tell you to stop whatever you were doing there, or some words to that effect, "What are you doing?"; didn't you say, "Shut up"?

A. No. It wasn't necessary to use any rudeness.

Q. Oh, it wasn't?

A. No.

Q. And you didn't say "Shut up" to him?

A. No.

Q. And you continued to search in the apartment?

A. Yes, we did search.

Mr. DI LEO: That is all, your Honor.

Mr. BACON: No further questions.

The COURT: Officer, the conversation that you had with the defendant before you took him to his home or went with him to his home, were these trousers mentioned in that conversation?

The WITNESS: Yes, sir. His clothing was mentioned.

The COURT: Just what was said about it?

The WITNESS: Either Sergeant Friel or Sergeant Lubore asked him if he had another pair of shoes at home, other than those that he had on his feet, and he said that he did, and then he was asked what clothing he had worn the night before, and he enumerated what he had on.

The COURT: Well, after that what was said about going to his home and searching?

The WITNESS: The—if I may, I may be wrong—the co-defendant, we positively seized identifiable evidence
285 of the proceeds of the crime.

The COURT: No, I am interested in the conversation you had with Judd in which you said that you might go to his home and look.

Just how did that arise?

The WITNESS: Well, I showed him the evidence as we had seized it in the room of the co-defendant, where he was arrested, and I asked him about the other things that had come from that housebreaking, whether he had any of the tools used, and he denied having them. And I said, "Are you sure you don't have them at home, hidden?"

He says, he didn't have anything there, that he had nothing to hide; that we could go there and see for ourselves.

The COURT: Now, was the conversation about the shoes and the clothing before that or after that?

The WITNESS: That came after that, about the shoes and clothing.

The COURT: What was said about that?

The WITNESS: Well, then he was asked about how he was dressed, and he enumerated as far as he could remember his clothing. He was asked where those clothes were, and he said they were at home.

The COURT: You may step down.

(The witness left the stand.)

The COURT: Wasn't Judd before me a year or two
286 ago on a robbery charge, and wasn't he acquitted before me on a robbery charge?

Mr. DI LEO: Yes, your Honor.

The COURT: And he is back again now, and before that wasn't he before me about three or four years ago?

Mr. DI LEO: About four years ago.

The COURT: So this is the third time he is before me.

Mr. BACON: That is all the evidence the Government has, your Honor.

The COURT: You may proceed, Mr. Di Leo.

Mr. DI LEO: Would you have Mrs. Judd come in, please?

The COURT: He was put on probation the first time.

Mr. DI LEO: That is right, your Honor.

The COURT: And he didn't mend his ways.

Thereupon CONSTANCE ELIZABETH JUDD was called as a witness for and on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

Direct examination.

287 Q. You are the wife of Mr. Judd?

A. That is right.

Q. Were you home on the early morning of March 25, 1950?

A. Yes.

Q. Would you tell his Honor just what took place and about what time in the morning?

A. Well, about 2 o'clock or a little after, somebody opened the front door and walked in, and knocked on my door, and I opened it, and there were four men. Bob was in the middle with handcuffs on, and they said, "Police," and they walked in.

I asked Bob what was wrong, and they told me to be quiet, there couldn't be any talking.

Then they wanted to know where Bob's money was. I thought they meant his billfold, because I had that in my pocketbook, so I got it out and then they started asking me where the rest of it was.

I told them I didn't have any more of his money.

Q. Now, Mrs. Judd, did you hear your husband at any time give them permission to search the room?

A. No, he didn't open his mouth. They didn't let him.

THE COURT: Of course, the testimony is that he gave that permission at Police Headquarters before they
288 went to his home. The Government does not contend that the permission was given at the home. The Government contends that the permission was given at Police Headquarters before they proceeded to the house.

BY MR. DI LEO:

Q. Was there any statement made by your husband at that time?

A. No.

Q. Would you tell his Honor what these officers took, if anything?

A. They took a camera, a pair of sunglasses, a pair of trousers, and a pair of shoes, and his billfold. That is all.

MR. DI LEO: I believe that is all, your Honor.

MR. BACON: I have no questions.

ROBERT JENNINGS JUDD, the defendant, was called as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By MR. DI LEO:

Q. State your full name, Robert.

289 A. Robert Jennings Judd.

Q. Where do you reside, Mr. Judd?

A. 906 Maryland Avenue, Northeast.

Q. Did you have occasion to be taken in custody by the police on March 24 of this year?

A. It was March 25.

Q. Was it in the afternoon or evening?

A. It was in the evening.

Q. And where were you taken from?

A. I stopped by Mr. White's house on 8th Street, Northwest.

Q. And who were the officers that took you in custody at that time?

A. Sergeant Talbott and I think Sergeant Cooper was there; I am not sure. There were so many of them I didn't know which was which.

Q. Where did they take you to?

A. Police Headquarters.

Q. Did they place any charge against you at that time?

A. No.

Q. Did they tell you what they wanted at that time?

A. They asked me about some housebreaking activities, and I told them I didn't know anything about it.

Q. Where were you confined during that period of time after you were taken from 908 8th Street?

290 A. I went to Headquarters and then they took me down to No. 1 Precinct in the cell block.

Q. How long did you stay down in the cell block?

A. Well, I don't know. They had me down there for about an hour and then took me up and took me back down again, two or three times during that period I was there.

Q. Two or three times?

A. Yes.

Q. Did you ever tell them or at any time give them permission to go to your home?

A. No, I didn't.

Q. Would you tell his Honor in your own words the last time they came down to get you to take you—

A. I didn't understand that.

Q. When was the last time?

THE COURT: When was the last time, what?

MR. DI LEO: That night that they took him to go out with them, to accompany them.

THE WITNESS: I believe it was about 1 o'clock, they came down and took me up to Headquarters, and I sat up there and they asked me some questions, and the next thing I knew they put some cuffs on me and took me down in a car and started off. Well, I didn't know where they were going and got pulled up in front of my house, and I said, "Well, what are you going to do here?"

291 BY MR. DI LEO:

Q. Now, did you at any time have any conversation with any of the officers with respect to going to your home that morning?

A. No, I didn't.

Q. Did you give them permission to get your keys to go to your home?

A. No, I didn't.

Q. Did you have any discussion with the officers about any shoes or any trousers or anything?

A. No, I did not.

Q. Did you ever admit or deny any offense committed?

A. I denied anything up there about the housebreaking charge that they questioned me about.

Q. Is it your statement now that you denied giving them permission to go to your home?

A. Yes, I do.

Q. When did you first find out that you were going to your home?

A. When they got within a block of it. I suspected where they were going.

Q. Did anybody tell you then where they were going?

A. No, they didn't.

Q. What happened, Bob, when they came up in front of your home?

292 A. Well, I asked them what they were going to do. They told me to shut up.

Q. Did they ever tell you then they were going for a pair of shoes?

A. No, they never mentioned any shoes.

Q. When you got up to the front door of your home, that is, where you and your wife reside, tell his Honor just what took place. Tell him in your own words.

A. Well, there were two of them in front of me and two of them in back of me; went up to the door that leads into the house, and one of them had the keys and opened the door.

Q. You mean the officer opened the door?

A. Yes.

Q. Do you know what officer it was that opened your door?

A. I believe—I am not positive—I am not positively sure, but I think it was Sergeant Talbott.

Q. Did you ever have the keys at all in your possession that night?

A. No, I didn't. From the time they took them from me at No. 1 Precinct until they were returned to my wife about two weeks ago.

Q. You say they took them from you at No. 1—you mean the early part of the evening or the latter part of the evening?

A. When they booked me in No. 1.

293 Q. When the Officer, Sergeant Talbott, opened your door—you believe it was Sergeant Talbott, or one of the officers—what happened after that?

A. Well, they went to the room, the door of the room that I have there, my wife and I, and knocked on it. So I waited a couple of minutes and she cracked the door. It was early in the morning and she didn't know who was out there. And when she cracked the door, one of them pushed it, and pushed her up against the wall, and two of them went on in, and then I was in the middle of the four of them, so the five of us went in the room.

Q. Now, did you make any objection about them going into your room?

A. I told them they had no right there.

Q. What did they tell you in reply to that?

A. They told me to shut up. They took me on one side of the room and took my wife out in the hall, and then about two minutes later they brought her back in and had her at the other end of the room.

Q. Did you at any time give them permission to go——

The COURT: You asked him that three times.

Mr. DI LEO: All right. That is all I have, your Honor.

Cross-examination.

By Mr. BACON:

Q. Did you hear your wife testify before?

A. Yes, I did.

294 Q. Did you hear her say anything about the door being pushed open or her being pushed back across the room?

A. I don't remember that now.

Q. Well, was the door pushed open and was she pushed back across the room?

A. She certainly was.

Q. And Sergeant Talbott was the one that opened the door?

A. I believe it was Sergeant Lubore. In fact, I am almost sure of it.

Q. But you are sure you didn't open the door?

A. I was in between the four of them; two of them in front of me and two of them behind me. I was not anywhere near the door.

Q. And you don't recall any conversation at Police Headquarters concerning the clothing that you were wearing the night before?

A. No, I do not.

Q. That was never mentioned?

A. Not to me.

Q. Was burglar tools ever mentioned to you?

A. They asked me if I had any.

Q. What did you say?

A. I said, "I don't have any use for such tools."

Q. Did they ask you if you had any in your home?

295 A. They never asked me that.

Q. That is all they said about burglar tools?

A. That is all.

Q. They dropped the subject when you said you didn't have any?

A. That is right.

Mr. BACON: No further questions.

The COURT: Does counsel care to be heard?

Mr. DI LEO: Your Honor, I have this to say for the record, that here is a case that absolutely is directly against all violations as far as search——

296 The COURT: No, the search is perfectly valid if the permission was given as the police say it was.

So the only question is, who is telling the truth, the police officers or Judd; because if the police officers' story is to be accepted, why, the search was perfectly legal.

Mr. DI LEO: If it is to be accepted, if it please the Court, but your Honor well knows, and your Honor has been in this Court and has heard numerous criminal cases—if this were a man's first offense, as your Honor brought out, I would say yes, the man might say, "Yes, you may search my place," but does your Honor honestly believe that a man who has been before you and been in here before, as your Honor so designated, several times, and would actually voluntarily tell the man——

The COURT: Is it your argument that because this man is a criminal by trade and has had many contacts with the police, that he was too smart to tell the police to make the search? Is that your point?

Mr. DI LEO: That might even be a good argument, your Honor. I don't think that is beyond the limits of the mind to comprehend the fact of a man who has been on other charges would deliberately go ahead and give testimony against him.

I think that is understandable, and I say in this case I don't believe that he did. I say sincerely I don't think he would have.

297 And I say on the strength, if it please the Court, of the Supreme Court decision in the Rabinowitz case, I say it is a violation; I say it is a violation of the man's rights.

The COURT: The question in this case is whether the search was made with the defendant's consent. Of course, if it was made without the defendant's consent, it was illegal, because the search was not incidental to an arrest and it was not made with a search warrant.

The officers testified that the defendant had given his consent, in fact had initially suggested that the officers search his place if they so desired.

The defendant denies that he did so and it is a question of veracity as between the two police officers on the one hand and the defendant on the other.

The two police officers impressed the Court as gentlemen of probity. The defendant is unworthy of belief, because of his past conflicts with the law.

He was placed on probation once for a serious offense; was arrested at a subsequent time for violation of probation. He was before this Court on a robbery charge on which he was acquitted for insufficiency of evidence, but he certainly has not been a good law-abiding citizen.

He certainly is not entitled to ask the Court to accept his word as against officers of the law.

The Court is only too sorry for the defendant's
298 wife, because the members of a family are always the
innocent sufferers where one of the other members
of the family is a criminal.

The motion to suppress is denied.

PETITION FOR REHEARING EN BANC

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,780

ROBERT J. JUDD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District
of Columbia

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED JUL 12 1951

Joseph W. Stewart
CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,780

ROBERT J. JUDD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District
of Columbia

PETITION FOR REHEARING EN BANC

This is a petition for rehearing en banc in the above-entitled case. Appellant, Robert J. Judd, was convicted in the District Court of this jurisdiction of the crimes of housebreaking and grand larceny, D. C. Code (1940) §§ 22-1801, 22-2201. The conviction rested principally on certain evidence obtained by the police from appellant's apartment. The search from which the seizure of this all-important evidence resulted was made without a warrant of any kind. Concededly, it was not incident to appellant's arrest. The search was defended solely on the ground that it was made with appellant's consent. Appellant denied that he gave his consent at all, but this conflict of testimony was resolved in the Government's favor by the District Judge who heard appellant's motion to suppress evidence.

Nevertheless, this Court has held that the testimony of the Government witnesses, taken at full value, fails to show by clear and convincing evidence that the consent given by appellant was free of duress and coercion. And it is to this precise ruling that the instant petition is directed.

(1)

Appellant was in custody at police headquarters at the time that he gave his alleged consent to the search. He was under interrogation by police officers. The testimony of the Government witnesses as to appellant's consent was as follows (emphasis supplied throughout):

(J. A. 86)

Q. Did you have any conversation with him prior to going to his residence?

A. I did.

Q. Would you tell us that conversation?

A. *I told him we were looking for a pair of shoes, and asked him if he had any extra shoes at home, and he stated he did. I asked him if he minded us going over to his room and taking a look, and he said no. We went over there.*

Q. And who went with you?

A. Sergeant Lubore and Sergeant Talbott.

Q. And did the defendant accompany you?

A. Yes, he did.

Q. And did you go into his place of abode?

A. We did.

Q. And how did you gain admittance?

A. We had the key to his room.

Q. Where did you get the key?

A. We had that at Headquarters and we finally took it, and with us, and handed it to him at the front door.

Q. *Who opened the lock, or turned the lock to open the front door?*

A. *The defendant Judd.*

Q. And what did you do after you got in the building?

A. After we got in the building it was a rooming house, and he lived in the front room on the first floor, and we rapped at the door and his wife asked who was there. We said, "The police." She said, "Just a moment." She later opened the door and said, "My God, what's the trouble?" We told her her husband was in a little trouble, and she said, "Well, come in," and we went in the room.

Q. What did you do after you got in the room?

A. I told her we were looking for a pair of shoes and just as I walked in the room, I spied a pair of shoes up on top of a clothes cabinet, and those were the shoes that I was looking for.

* * * * *

(J. A. 87)

Q. Did at any time these people object to your entrance into the room?

A. They did not.

Q. Did at any time these people object to your searching the room?

A. They did not.

* * * * *

(J. A. 88)

Q. Did he give you consent to search that room?

A. He didn't give us actual consent to search it. He gave us consent to go in there. *I told him I was looking for a pair of shoes and he said it was all right to go over there, and I found what I look for.*

Q. He said it was all right to go over there?

A. That is right.

Q. And you took him with you to go over there?

A. That is right.

* * * * *

(J. A. 90)

Q. And did the defendant accompany you?

A. Judd accompanied us.

Q. Did he freely accompany you?

A. He did.

Q. Did you have any conversation with him prior to going to his home?

A. We did.

Q. Tell us that conversation, as best you remember it, please, Sergeant.

A. After Judd's arrest, we questioned him in regard to a housebreaking safe job. He denied any knowledge of it whatsoever. We questioned him about his background, the amount of money he had, where he was

working. He stated that he was unemployed and that he had in the neighborhood of \$150 or \$160 at home that he had won gambling. We questioned him as to whether he had any tools that could be used in ripping safes.

* * * * *

THE WITNESS. So, *he said we would go out to his place and see, if we believed he had any of these things there.* So I went down to the cell block where his property was. I got the key from there and, in the cruiser we went out to his house. On arrival at the front door the key was given to him. It is a rooming house. He opened the front door, the street door, with the key, and we went in. His room is the first floor front; knocked on the door, and a woman's voice answered asking who it was, and we stated it was the police, with her husband. She said, "Just a minute." She had to put something on. Then after a very brief pause, the door was opened by her. We identified ourselves as police officers. She saw her husband. The next thing she said, "Oh, my God, what has he done now?" So we asked to come in, and she allowed us to come in. We explained what we were there for.

* * * * *

(J. A. 91)

Q. At any time did these people complain of your presence in the room?

A. No, they did not.

Q. At any time did these people complain of your search of the room?

A. They did not.

Q. Were you given permission to enter the room?

A. We were.

Q. By whom?

A. By Robert Judd himself, and then on our arrival there we were invited in by his wife.

* * * * *

Q. Sergeant Talbott, did you tell Mr. Judd where you were taking him when you took him out of the building across the street?

A. Yes, we did.

Q. You did tell him?

A. We told him where we were taking him; yes.

Q. When did you tell him you were taking him to his home?

A. *We had a conversation about his home and his property there, and he said we were free to go there and see, he had nothing to hide.*

* * * * *

(J. A. 92)

Q. Isn't it a fact, Sergeant Talbott, you never did tell Judd where you were taking him until you got in front of his house?

A. No. We had a conversation before and I told him where we were going, and he was well aware of the fact that we were going to his home. *He said he had nothing to conceal or hide out there, and it was perfectly all right for us to go out there.*

* * * * *

(J. A. 93)

The COURT. Officer, the conversation that you had with the defendant before you took him to his home or went with him to his home, were these trousers mentioned in that conversation?

The WITNESS. Yes, sir. His clothing was mentioned.

The COURT. Just what was said about it?

The WITNESS. Either Sergeant Friel or Sergeant Lubore asked him if he had another pair of shoes at home, other than those that he had on his feet, and he said that he did, and then he was asked what clothing he had worn the night before, and he enumerated what he had on.

The COURT. Well, after that what was said about going to his home and searching?

The WITNESS. The—if I may, I may be wrong—the codefendant, we positively seized identifiable evidence of the proceeds of the crime.

The COURT. No, I am interested in the conversation you had with Judd in which you said that you might go to his home and look.

Just how did that arise?

The WITNESS. Well, I showed him the evidence as we had seized it in the room of the codefendant, where he was arrested, and I asked him about the other things that had come from that housebreaking, whether he had any of the tools used, and he denied having them. And I said, "Are you sure you don't have them at home, hidden?" *He says, he didn't have anything there, that he had nothing to hide; that we could go there and see for ourselves.*

The COURT. Now, was the conversation about the shoes and the clothing before that or after that?

The WITNESS. That came after that, about the shoes and clothing.

The COURT. What was said about that?

The WITNESS. Well, then *he was asked about how he was dressed*, and he enumerated as far as he could remember his clothing. *He was asked where those clothes were, and he said they were at home.*

The majority of the Court has held that the foregoing testimony "hardly establishes willing agreement that the officers search the household without first procuring a warrant." The Court, however, fails to explain why this is so, and to us, it seems that the Government's testimony plainly showed that defendant did consent to the search.

Moreover, the Court's opinion appears to be in conflict with prior decisions on comparable facts. For instance, in *Mitchell v. United States*, 78 U. S. App. D. C. 171, 138 F. 2d 426 (1943), reversed on other grounds 322 U. S. 65 (1944), a consent to a search was apparently held to have been free from duress under circumstances very similar to those of the case at bar. And the same is true of *DeLapp v. United States*, 53 F. 2d 627 (C. C. A. 8, 1931) which was even closer on the facts to the instant case. In *Lisenba v. California*, 314 U. S. 219 (1941), a conversation was held to be voluntary where the testimony in regard to duress was far more compelling than in the present

case. See also *Garner v. United States*, 84 U. S. App. D. C. 361, 174 F. 2d 499 (1949).

From the foregoing it is respectfully submitted that the majority's opinion as it now reads works a substantial change in existing law and is in conflict with certain prior decisions of this Court, of other federal circuit courts, and of the Supreme Court of the United States. Under the circumstances it is respectfully submitted that the case should be reset for argument before the full bench.

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CERTIFICATE

Joseph M. Howard, attorney for appellee, hereby certifies that his petition for rehearing is presented in good faith and not for purposes of delay.

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